(1)

No. 84-1414

Office - Supreme Court, U.S.
FILED
MAR 7 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDRIC HABERMAN, *et al.*,
Petitioners,

v.

CHEMICAL BANK and WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Attorneys for Petitioners

March 6, 1984

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4214

QUESTION PRESENTED

Does the denial by a state court of a timely motion to intervene in a lawsuit that is adjudicating the property interests of those seeking intervention -- when no other party can fully represent those interests -- deny due process of law?

PARTIES

Petitioners -- proposed Plaintiff-Intervenors below -- are Fredric Haberman, Claude Purvis, Nerow Cheng, Ted R. Pape, Aubrey L. Moss, and John H. Biggs.

Respondents Chemical Bank and the Washington Public Power Supply System were appellants below.

Respondents below and in this Court are Public Utility District No. 1 of Benton County, Washington; Central Lincoln People's Utility District, Oregon; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Clatskanie People's Utility District, Oregon; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No.

1 of Pend Oreille County, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 10, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Ellensburg, Washington; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port

Angeles, Washington; City of Richland, Washington; City of Rupert, Idaho; City of Springfield, Oregon; City of Steilacoom, Washington; City of Sumas, Washington; City of Tacoma, Washington; Alder Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachly-Lane Electric Cooperative Association, Oregon; Central Electric Cooperative, Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Oregon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural

Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company, Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Valley Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights, Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington;

Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Pavelli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salem River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington; Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; and West Electric Cooperative, Inc., Oregon.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

No.

Fredric Haberman, et al.,

Petitioners,

v.

Chemical Bank and Washington
Public Power Supply System, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners Fredric Haberman, et al., conditionally petition this Court for a writ of certiorari to the Supreme Court of the State of Washington. Only if this Court grants the writ of certiorari in No. 84-1258, Chemical Bank and Washington Public Power Supply System v.

Public Utility District No. 1 of Benton County, Washington, et al. (Feb. 4, 1985), do petitioners Haberman, et al., seek review in this Court.

OPINIONS BELOW

The decision of the Supreme Court of Washington denying intervention to petitioners is reported at 102 Wash.2d 874 (1984) and is set forth in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Washington was issued November 6, 1984. Petitioners timely filed a motion for reconsideration, which was denied on December 17, 1984. See Appendix B. This Court has jurisdiction to review the decision of the Supreme Court of Washington under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The following provision is pertinent to this case: section 1 of the Fourteenth Amendment to the U.S. Constitution, set forth in Appendix C.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners Haberman, et al., are six present and former bondholders acting in a representative capacity, who sought to intervene in Chemical Bank v. Washington Public Power Supply System, 102 Wash.2d 874 (1984) (Chemical Bank II), App. A. They timely sought intervention when it became clear that Chemical Bank, the bond trustee, had adopted legal positions that through operation of the law of res judicata and collateral estoppel could jeopardize the interests of petitioners. The Supreme Court of Washington denied petitioners leave to intervene and reaffirmed that ruling when it denied petitioners' motion for clarification and reconsideration. See App. B.

Petitioners, together with 144 other individuals and 65 institutions with claims aggregating more than $100 million, are pursuing relief in the Superior Court of Washington for King County through a second amended complaint, leave for which to file was recently granted. By this complaint, petitioners have alleged inter alia violations of Washington state securities laws, equitable causes of action arising under state law, and derivative claims of negligence and professional malpractice against the accountants and other professionals involved in the engineering, construction, and financing of two nuclear generating plants.

Haberman, et al. v. Washington Public Power Supply System, et al., and Chemical Bank, No. 84-2-06452-8.[1]

Because petitioners Haberman, et al., have other avenues of relief available to them -- the Haberman lawsuit in state court -- petitioners initially did not intend to seek review of the Washington State Supreme Court's denial of intervention.[2] If this Court grants the writ to Chemical Bank in Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.,

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[1] United States Trust Co. and American Express with claims totalling approximately $340,000,000 have been granted leave to intervene.

[2] Petitioners are also members of the plaintiff class in In re Washington Public Power Supply System Securities Litigation, MDL 551.

No. 84-1258 (Feb. 4, 1985), petitioners respectfully request that the Court also grant the writ to petitioners. Clearly the denial of intervention merits review by this Court.

First, the Washington State Supreme Court's denial of leave to intervene constitutes an abridgement of the fundamental right protected by the Fourteenth Amendment: the right to be heard in a court of law with respect to the adjudication of claims affecting property interests. Second, Chemical Bank has not represented and cannot represent the interests of all current and former of the bonds in this case. Third, if the Court chooses to hear the Chemical Bank case, it ought to have before it all the legal interests that this litigation concerns.

BACKGROUND

In brief, the history of this case begins in the early 1970's, when public utility experts forecast the need for substantially greater electrical generating capacity in the Pacific Northwest. To develop new electrical generating capacity, public utilities joined together to form the Washington Public Power Supply System, a "joint operating agency" under Washington State law. The Supply System consists of 23 Washington municipalities, 20 of which were participants in the projects at issue in this case. App. A, 10a - 12a.

Five nuclear power plants were formed, each financed through the sale of bonds. The bonds for projects 1, 2, and 3 were effectively guaranteed by the Bonneville Power Administration, which financed the projects through a net billing arrangement. The bonds for projects 1, 2, and 3 are not in default and are not relevant to this case.

Changes in the law effectively prohibited Bonneville Power from supporting projects 4 and 5. Instead, these projects were financed through a provision -- commonly called a "dry hole" agreement -- which obligated the participants to guarantee payment on the bonds regardless of whether projects 4 or 5 were ever completed. Based on the contractual security of these guarantees, memorialized in "Participants' Agreements," bonds for projects 4 and 5 were sold in 14 issues beginning in 1977 and ending in April 1981. App. A, 19a. Projects 4 and 5 encountered enormous cost overruns and delays. In addition, demand for electricity never reached the level forecast. Construction of the power plants ended in May 1981. The Supply System formally terminated projects 4 and 5 on January 22, 1982. Id.

In May 1982, before the declaration of default on the bonds for projects 4 and 5, Chemical Bank filed a complaint in King County Superior Court, seeking a declaration that the participants in the Supply System remained liable for payment of the bonds under their "dry hole" commitments. App. A, 19a - 20a. Chemical Bank's authority to sue to enforce the Participants' Agreement arose from provisions contained in Bond Resolution 890, the instrument that inter alia sets forth the rights and obligations of bondholders, on the one hand, and the bond trustee -- Chemical Bank -- on the other. The state trial court granted Chemical Bank's motion for summary judgment, holding that the Washington participants had authority to enter into the Participants' Agreement and could be held liable for payment of debt service on the bonds in the event of default by WPPSS.[3] Id.

The participants appealed directly to the Washington State Supreme Court, bypassing the intermediate appellate court. The Washington State Supreme Court reversed. Chemical Bank v. Washington Public Power Supply System, 99 Wash.2d 722 (1983). The court held that the Washington municipalities had acted ultra vires in entering the Participants' Agreements and agreeing to the "dry hole" provision.[4]

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[3] The court reserved for trial certain affirmative defenses raised by the participants.

[4] The Idaho Supreme Court reached a similar conclusion in Asson v. City

[Footnote continued]

On remand to the trial court, Chemical Bank and WPPSS raised a variety of legal and equitable claims under state law, for example, restitution and estoppel, seeking to bar enforcement of the Supreme Court's _ultra vires_ holding with respect to the Participants' Agreement. It also raised federal constitutional challenges. On August 11, 1983, and September 16, 1983, the trial court rejected all challenges and granted summary judgment on behalf of all participants dismissing Chemical Bank's declaratory judgment action. App. A, 21a - 23a. Two points merit special emphasis.

[Continued from previous page]

of Burley, 105 Idaho 432, 670 P.2d 839 (1983), _cert. denied_, 105 S. Ct. 219 (1984). _But see_ _DeFazio v. Washington Public Power Supply System_, 296 Or. 550, 679 P.2d 1316 (1984).

First, when Chemical Bank brought its suit in May 1982, the bonds were not in default. And under the Bond Resolution, Chemical Bank had complete authority -- unchallenged by petitioners -- to enforce the Participants' Agreement "in the shoes" of WPPSS. Second, in aid of this authority and at the request of WPPSS and with the active support of the participants, the state trial court entered a restraining order which expressly enjoined all "entities presently or hereafter owning any bonds" from seeking a declaration of default of the bonds and from "exercising any remedies upon any such default. . . ." This restraining order was not lifted by the trial court until July 22, 1983. Although the prospective default was announced at an October 4, 1983 public meeting of former and present bondholders at the Felt Forum in New York City, actual default on the bonds actually occurred on January 3, 1984, when Chemical Bank refused to honor payment of interest coupons.

Chemical Bank again appealed the trial court's decision directly to the Washington State Supreme Court. Petitioners Haberman, et al., filed their motion to intervene and a draft complaint in intervention with the Washington State Supreme Court on January 19, 1984, just two weeks after actual default when their right under Bond Resolution 890 to intervene had ripened. The express purpose of the intervention was to protect the interests of current and former bondholders, which as a practical matter were not being adequately represented by Chemical Bank. Petitioners sought remand of the case back to the trial court so that a factual record of petitioners' legal and equitable claims could be developed. The State Supreme Court granted petitioners' motion to participate in oral argument.

On November 6, 1984, the Washington State Supreme Court issued its decision affirming the trial court's grant of summary judgment against Chemical Bank and WPPSS and in favor of the participants. Chemical Bank v. Washington Public Power Supply System, 102 Wash.2d 874 (1984), App. A. The court reiterated its earlier decision that the participants had acted ultra vires in entering into the Participants' Agreement.

In deciding this issue, the court also denied the motion to intervene filed by petitioners Haberman, et al.

The court based its decision on two grounds. First, it concluded that the proposed intervention was untimely because it was not sought "until this action reached the late stages of the appellate process." App. A, 30a. Second, the court held that in any event, petitioners had no right to intervene because the "interested parties have a designated representative," Chemical Bank, which has "vigorously pressed the bondholders' claims." App. A, 31a - 33a. (emphasis in the original).

As the Washington State Supreme Court itself recognized, to deny intervention to petitioners required the court to ignore the plain language of RCW 7.24.110 which has no timeliness requirement and to reverse its decision in Williams v. Poulsbo Rural Tel. Ass'n, 87 Wash.2d 636, 555 P.2d 1173 (1976), which held that the failure to make interested persons parties in a declaratory judgment action is a jurisdictional defect. App. A, 28a - 29a.

Petitioners filed a timely motion for clarification and reconsideration, which was denied by the Washington State Supreme Court on December 17, 1984. App. B.

REASONS FOR GRANTING THE WRIT

Fundamental to any notion of due process of law is the right to be heard in any legal proceeding that affects a person's liberty or property. The right to be heard has been articulated on numerous occasions by this Court, perhaps most powerfully in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950): "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case."

To be sure, adequate representation by a legal surrogate may provide the opportunity to be heard required by due process. "It is familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . or where . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

However, "it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and Hansberry v. Lee, supra). Under Hansberry, a person affected by a litigation, but not represented or inadequately represented by its parties, has a due process right to intervene in the suit. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 919 (3d Cir. 1978).

The Washington State Supreme Court denied intervention to petitioners on two grounds: the application to intervene was untimely, App. A, 30a, and

Chemical Bank as Bond Trustee was the "designated representative" of all bondholders under the Bond Resolution. App. A, 31a (emphasis in the original). Neither holding can withstand due process scrutiny.

First, prior to the court's decision in this case, neither the Washington state statutes nor case law imposed a timeliness requirement for a motion to intervene. To the contrary, the failure to make an interested person a party in a declaratory judgment action was a jurisdictional defect. Williams v. Poulsbo Rural Tel. Ass'n, 87 Wash.2d 636, 555 P.2d 1173 (1976). Thus, failure to join an interested party required remand. Id. In order to hold petitioners' motion to intervene untimely, the Washington State Supreme Court was required to overrule the Williams decision. This the court expressly did. App. A, 28a - 29a & n.4.

A newly announced procedural rule cannot constitute adequate and independent state grounds sufficient to defeat Supreme Court review of due process claims. As this Court stated in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958), "such a local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their

federal constitutional rights."
(Emphasis added.)

In any event, petitioners Haberman, et al., filed their motion to intervene as soon as practical under the circumstances. As noted above, when Chemical Bank filed its complaint for declaratory judgment in this action, the bonds were not in default. Under the Bond Resolution, Chemical Bank as Bond Trustee had exclusive authority to enforce the Participants' Agreement. In aid of this authority and at the request of WPPSS, the trial court on May 27, 1983, entered a restraining order which expressly enjoined all "entities presently or hereafter owning any bonds" from seeking a declaration of default of the bonds and from "exercising any remedies upon any such default. . . ." This restraining order was not lifted by the trial court until July 22, 1983. The trial court's orders dismissing Chemical Bank's declaratory judgment suit occurred on August 11 and September 16, 1983. At that time the case was again directly appealed to the Washington Supreme Court. Moreover, although the prospective default was announced at the October 4, 1983 public meeting of former and present bondholders at the Felt Forum in New York City, the first default on the bonds actually occurred on January 3, 1984, when Chemical Bank refused to honor payment of interest coupons. Petitioners filed their motion to intervene on January 19, 1984, just two weeks after default. Their motion to intervene was filed as quickly as practicable under the circumstances and was thus "timely" by any due process standard.

The second ground for the Washington State Supreme Court's denial of intervention -- that Chemical Bank was the representative of petitioners, App. A, 31a -- is also constitutionally insufficient. Petitioners do not dispute that Chemical Bank acted properly in attempting to enforce the Participants' Agreement by standing "in the shoes" of WPPSS. However, there can be little doubt that Chemical Bank does not and could not adequately represent the interests of petitioners.

First, because Chemical Bank brought suit against the participants "in the shoes" of WPPSS, defenses may be asserted against it under Washington law that could not be asserted against bondholders who are holders in due course. E.g., Royce v. Public Utility Dist. No. 1 of Clark County, 26 Wash.2d

733, 175 P.2d 624 (1946). Moreover, because it does not itself hold bonds, Chemical Bank could not bring before the Washington courts all the causes of action available to bondholders. For example, Chemical Bank does not have standing to assert the bondholders' securities claims. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); see also In re Equity Funding Corporation of America Securities Litigation, 603 F.2d 1353 (9th Cir. 1979).

Chemical Bank is authorized under the Bond Resolution to represent only current bondholders.5/ Petitioners

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5/ Paradoxically, if the only available remedy were enforcement of the Participants' Agreement -- the relief Chemical Bank seeks -- only current holders of bonds would recover, a group that as the dissenting opinion in this case observes includes a substantial

[Footnote continued]

include both present and former bondholders. Chemical Bank cannot possibly represent former bondholders. These persons therefore are now unrepresented in this suit and never have been represented.

Second, Chemical Bank operates under a serious conflict of interest. To the extent that the Bond Trustee is functioning as a quasi-trustee in reorganization for projects 4 and 5, it may represent only WPPSS. It cannot bring

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number of speculators who purchased bonds after June 15, 1983, when the Washington State Supreme Court decided Chemical Bank I. See App. A, 163a - 166a. By contrast, the Haberman action in state court and MDL 551 in federal court seek recovery for a broader group of investors, which includes those who purchased bonds before June 15, 1983, and then sold them at great loss after the participants repudiated their promise to pay debt service on the bonds.

an action on the part of any persons or entities other than WPPSS. See Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416 (1972); Rochelle v. Marine Midland Grace Trust Co. of New York, 535 F.2d 523 (9th Cir. 1976). Indeed, Chemical Bank was appointed Bond Trustee not by the bondholders whom it professes to represent, nor by a disinterested third party. Rather, WPPSS, the issuer of the bonds, appointed Chemical Bank under section 7.1 of the Bond Resolution and pays its compensation. Bond Resolution, § 7.9. Whether or not Chemical Bank has refrained from suing certain parties as a result of its conflict, it has not litigated this action as a representative is required. For instance, Chemical Bank has not brought suit against the professional engineers involved in the projects, who also were appointed by respondent WPPSS. Id. § 8.1. Such conflicts belie the "good faith" required to find a trustee an adequate representative of its beneficiary. See Hansberry v. Lee, supra; Kersh Lake Drainage District v. Johnson, 309 U.S. 484, 491 (1940).

The Washington State Supreme Court's denial of intervention to petitioners goes to the heart of due process. This Court has clear authority to review the Washington State Supreme Court's denial of intervention. E.g., Local 283, International Union of United Automobile Workers of America v. Scofield, 382 U.S. 205, 209 (1965). The Court should grant the writ in order to allow petitioners their day in court: the relief petitioners sought in the Washington Supreme Court.

Conclusion

For the reasons stated, the Court should grant the writ of certiorari if it grants the writ in No. 84-1258, Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 49868-7
EN BANC

CHEMICAL BANK, a New York
corporation,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY
SYSTEM, a Washington municipal
corporation and joint
operating agency,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1 of
Benton County, Washington;
CENTRAL LINCOLN PEOPLE'S UTILITY
DISTRICT, Oregon; PUBLIC UTILITY
DISTRICT NO. 1 of Chelan County,
Washington; PUBLIC UTILITY DISTRICT NO. 1 of Clallam County,
Washington; PUBLIC UTILITY DISTRICT NO. 1 of Clark County,
Washington; CLATSKANIE PEOPLE'S
UTILITY DISTRICT, Oregon; PUBLIC
UTILITY DISTRICT NO. 1 of Cowlitz
County, Washington; PUBLIC UTILITY
DISTRICT NO. 1 of Douglas County,
Washington; PUBLIC UTILITY DISTRICT
NO. 1 of Franklin County, Washington; PUBLIC UTILITY DISTRICT NO. 2
of Grant County, Washington; PUBLIC UTILITY DISTRICT NO. 1 of Grays
Harbor County, Washington; PUBLIC
UTILITY DISTRICT NO. 1 of Klickitat

County, Washington; PUBLIC UTILITY)
DISTRICT NO. 1 of Lewis County,)
Washington; PUBLIC UTILITY DISTRICT)
NO. 1 of Mason County, Washington;)
PUBLIC UTILITY DISTRICT NO. 3 of)
Mason County, Washington; NORTHERN)
WASCO COUNTY PEOPLE'S UTILITY DISTRICT, Oregon; PUBLIC UTILITY DISTRICT NO. 1 of Okanogan County,)
Washington; PUBLIC UTILITY DISTRICT NO. 2 of Pacific County,)
Washington; PUBLIC UTILITY DISTRICT NO. 1 of Pend Oreille County,)
Washington; PUBLIC UTILITY DISTRICT NO. 1 of Skamania County,)
Washington; PUBLIC UTILITY DISTRICT NO. 1 of Snohomish County,)
Washington; TILLAMOOK PEOPLE'S)
UTILITY DISTRICT, Oregon; VERA)
IRRIGATION DISTRICT NO. 10, Washington; PUBLIC UTILITY DISTRICT)
NO. 1 of Wahkiakum County, Washington; CITY OF BANDON, Oregon;)
CITY OF BLAINE, Washington; CITY)
OF BONNERS FERRY, Idaho; CITY OF)
BURLEY, Idaho; CITY OF CANBY,)
Oregon; CITY OF CASCADE LOCKS,)
Oregon; CITY OF CENTRALIA, Washington; CITY OF DRAIN, Oregon;)
CITY OF ELLENSBURG, Washington;)
CITY OF HEYBURN, Idaho; CITY OF)
IDAHO FALLS, Idaho; TOWN OF)
McCLEARY, Washington; CITY OF)
McMINNVILLE, Oregon; CITY OF)
MILTON-FREEWATER, Oregon; CITY OF)
PORT ANGELES, Washington; CITY OF)
RICHLAND, Washington; CITY OF)
RUPERT, Idaho; CITY OF SPRINGFIELD,)
Oregon; CITY OF STEILACOOM, Washington; CITY OF SUMAS, Washington;)
CITY OF TACOMA, Washington; ALDER)

MUTUAL LIGHT COMPANY, Washington;)
BENTON RURAL ELECTRIC ASSOCIATION,)
Washington; BIG BEND ELECTRIC)
COOPERATIVE, INC., Washington;)
BLACHLY-LANE ELECTRIC COOPERATIVE)
ASSOCIATION, Oregon; CENTRAL ELECTRIC)
COOPERATIVE, INC., Oregon;)
CLEARWATER POWER COMPANY, Idaho;)
COLUMBIA BASIN ELECTRIC COOPERATIVE,)
INC., Oregon; COLUMBIA RURAL)
ELECTRIC ASSOCIATION, INC., Oregon;)
CONSUMERS POWER, INC., Oregon;)
COOS-CURRY ELECTRIC COOPERATIVE,)
INC., Oregon; DOUGLAS ELECTRIC)
COOPERATIVE, INC., Oregon; ELMHURST)
MUTUAL POWER AND LIGHT COMPANY,)
Washington; FALL RIVER RURAL ELECTRIC)
COOPERATIVE, INC., Idaho;)
GLACIER ELECTRIC COOPERATIVE,)
Montana; HOOD RIVER ELECTRIC)
COOPERATIVE, Oregon; IDAHO COUNTY)
LIGHT & POWER COOPERATIVE ASSOCIATION,)
INC., Idaho; INLAND POWER &)
LIGHT COMPANY, Washington; KOOTENAI)
ELECTRIC COOPERATIVE, INC.,)
Idaho; LANE ELECTRIC COOPERATIVE,)
INC., Oregon; LINCOLN ELECTRIC)
COOPERATIVE, Washington; LOST)
RIVER ELECTRIC COOPERATIVE, INC.,)
Idaho; LOWER VALLEY POWER & LIGHT,)
INC., Wyoming; MIDSTATE ELECTRIC)
COOPERATIVE, INC., Oregon; MISSOULA)
ELECTRIC COOPERATIVE, INC., Montana;)
NESPELEM VALLEY ELECTRIC)
COOPERATIVE, INC., Washington;)
NORTHERN LIGHTS, INC., Montana;)
OHOP MUTUAL LIGHT COMPANY, Washington;)
OKANOGAN COUNTY ELECTRIC)
COOPERATIVE, INC., Washington;)
ORCAS POWER & LIGHT COMPANY,)
Washington; PARKLAND LIGHT & WATER)

COMPANY, Washington; PRAIRIE POWER)
COOPERATIVE, INC., Idaho; RAFT)
RIVER RURAL ELECTRIC COOPERATIVE,)
INC., Idaho; RAVELLI COUNTY ELEC-)
TRIC COOPERATIVE, INC., Montana;)
RURAL ELECTRIC COMPANY, Idaho;)
(SALEM ELECTRIC, Oregon; SALEM)
RIVER ELECTRIC COOPERATIVE, INC.,)
Idaho; TANNER ELECTRIC, Washington;)
UMATILLA ELECTRIC COOPERATIVE)
ASSOCIATION, Oregon; UNITY LIGHT)
AND POWER COMPANY, Washington;)
VIGILANTE ELECTRIC COOPERATIVE,)
INC., Montana; WASCO ELECTRIC)
COOPERATIVE, INC., Washington;)
WELLS RURAL ELECTRIC COMPANY,)
Nevada; WEST ELECTRIC COOPERATIVE,)
INC., Oregon),)
)
Respondents.)

Filed NOV. 6, 1984 .

This case first came before our court in Chemical Bank v. WPPSS, 99 Wn.2d 772, 666 P.2d 329 (1983) (Chemical Bank I) for resolution of the issue of whether 28 municipalities and public utility districts (PUDs) had statutory authority to enter into agreements to build Washington nuclear plants (WNP) 4 and 5. We held that no statutory authority, express or implied, existed and remanded the case for action in accordance with the opinion.

The trial court entered summary judgment in favor of all 88 participants (respondents) in WNP 4 and WNP 5. On appeal, appellants Washington Public Power Supply System (WPPSS) and the bondholders' trustee, Chemical Bank, raise multiple challenges to the trial judge's order of summary judgment.

Appellants also seek review of our decision in Chemical Bank I under the terms of Rules of Appellate Procedure 2.5(c)(2).

This factual and legal background, discussed in Chemical Bank I, is exceedingly complex. The primary legal issues discussed at length in this opinion can be summarized as follows:

Procedural Questions

1. Should this court reconsider its decision in Chemical Bank I?

2. Did the trial judge's order granting summary judgment in favor of all defendants exceed the proper scope of the declaratory judgment action initiated by Chemical Bank?

3. Are any bondholders entitled to intervene in this action at this stage in the proceeding?

Contractual Obligation

4. Do the Washington municipalities and PUDs have statutory authority, either express or implied, to enter into contracts which impose the risk of dry holes on their ratepayers?

5. If the Washington municipalities and PUDs did not initially have statutory authority to enter into these contracts, did the Legislature subsequently ratify the agreements?

6. Did the trial judge err in holding that, because the contracts were unenforceable as to the Washington municipalities and PUDs, they were also unenforceable as to the remaining defendants under any of these three theories: a) indivisibility of contract? b) mutual mistake? c) commercial frustration and impracticability?

Availability of Equitable Remedies

7. If the participants are not contractually obligated to the bondholders, are they nonetheless estopped from denying the obligation under either common law notions of estoppel or article 8 of the Uniform Commercial Code?

8. If the contracts are invalid, are the bondholders nonetheless entitled to restitution from the participants?

Constitutional Claims

9. Did the release of the participants' contractual obligation violate the bondholders' constitutional rights?

Our resolution of this case is as follows:

I

Procedural Preliminaries

For the reasons discussed below, we believe reconsideration of our decision in Chemical Bank I is appropriate. We find the summary judgment order did not exceed the scope of the declaratory judgment action and conclude the bondholders' motion to intervene should be denied.

II

Contractual Obligations

We herein affirm our decision in Chemical Bank I and reject appellants' arguments that the Legislature ratified the ultra vires contracts. We also affirm the trial judge's release of the 60 remaining participants' obligation on the grounds of commercial frustration and mutual mistake.

III

Equitable Obligations

Our review of the historical origins of equitable estoppel convinces us that the doctrine should not be applied to the facts of this case. We find that the statutory equivalent of equitable estoppel under the Uniform Commercial Code, RCW 62A.8-202, is inapplicable.

IV

Constitutional Claims

We find no violation of appellants' state or federal constitutional rights.

STATEMENT OF THE CASE

Procedurally, this case comes before the court following the trial judge's decision to grant summary judgment in favor of all defendant/participants in WNP 4 and WNP 5.

Chemical Bank I contains an extensive factual recitation. In addition, the following information pertains to the present action.

WPPSS is a joint operating agency and municipal corporation composed of 19 Washington public utility districts (PUDs) and four cities. It was formed in 1957 under the provisions of RCW 43.52.360. That statute allows cities or public utility districts and combinations thereof to form an operating agency "for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities . . . for the generation and/or transmission of electric energy and power." The statute further provides that after such an agency is formed, any other city or PUD may become a member upon application and affirmative vote of a majority of its members. A member may withdraw provided "[t]hat all contractual obligations incurred while a member shall remain in full force and effect." The agency may be dissolved upon the unanimous agreement of its members and "the members, after making provisions for the payment of all debts and obligations, shall thereupon hold the assets thereof as tenants in common."

In the early 1970s, WPPSS started construction of three nuclear power plants, WNP 1, WNP 2, and WNP 3. The projects were developed in conjunction with the Bonneville Power Administration. Although those plants also ran into financial trouble, it is the fate of two subsequent plants, WNP 4 and WNP 5, which concerns us here. Plans for these plants were developed when the 88 participants, respondents, joined with WPPSS and Pacific Power & Light Company (WNP 5 only) to obtain financing.1/ Each participant signed an identical 63-page participants' agreement (PA) dated July 14, 1976.

WPPSS then adopted a bond resolution which provided for the construction of both plants and the issuance of revenue bonds. As many of the parties' claims stem from interpretation of the PA, a detailed analysis of this document is necessary.2/

1/ Respondents include 9 Washington cities; 7 Oregon cities; 5 Idaho cities; 19 Washington PUDs; 1 Washington irrigation district; 43 rural electric cooperatives; and 4 Oregon PUDs.

2/ All page references are to the bound volume submitted as appendix to this appeal.

As noted in Chemical Bank I, the PA provided that each participant purchase a "share of the Project Capability" and "a right to purchase a share of the capability of any other generating plants undertaken by [the] Supply System . . . ." PA, at 2. Project capability was defined as

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

In addition, the participants' agreement gave each participant certain rights, both individually and through representatives on a participants' committee. As appellants claim the participants' committee granted significant control to the participants, a detailed analysis of its function is appropriate.

The committee was to be composed of not less than two nor more than seven members and participants were entitled to designate which representative would vote their shares. PA § 15(a). The participants' committee was required to meet at least quarterly during the construction of the projects. PA § 15(b). Committee meetings could be called anytime, however, if representatives with 20 percent of the participant shares so requested. Casting individual votes for each participant's share they represented, committee members were _required_ to vote the shares in the manner requested by the participants they represented. PA § 15(b), at 40.

The participants' agreement also detailed procedures for the transfer of information from WPPSS to the committee members and interested participants. The participants' agreement stated that the WPPSS was to provide the committee and any participants who so requested with the following information:

Determination of Minimum Capability.

> Construction budgets and changes therein (Section 8(a)).
>
> Award of any contract or approval of any change order, in either case in excess of $2,000,000, or such other contracts as determined by the Participants' Committee.
>
> Budgets of annual costs and revisions thereof (Section 8(b)).
>
> Fuel Plan, changes therein, and determinations relating thereto (Section 9).

Operating schedules (Section 10).

Insurance coverage, including limits and choice of insurers (Section 11).

Estimates of costs of repair of damage to a Project if in excess of $5,000,000, recommendation whether to repair in whole or in part or to remove from service and construction budget for repair of Project.

Sales of salvage materials in excess of such minimum amount as is established by the Participants' Committee.

Change of an architect-engineer.

Proposed Bond Resolutions.

Any proposal made by Participants' Committee members representing Participants' Shares voting rights of 20% or more.

Construction or acquisition of Nuclear Project No. 5 pursuant to Section 22(b) of the Ownership Agreement.

Repair of Nuclear Project No. 5 pursuant to Section 16(b) of the Ownership Agreement.

Increase in the Supply System's ownership interest in Nuclear Project No. 5 pursuant to

> Section 20 of the Ownership Agreement.

PA § 15(c), at 41-42.

Members of the participants' committee, representing 20 percent or more of the shares, could disapprove of any action by WPPSS in the above areas and could force the matter to be reviewed by a project consultant.3/ Using this power, the record indicates that the participants' committee disapproved the 1983 annual budget and disapproved of a contract settlement because the allocation of damages between WNP 3 and WNP 5 was "inequitable."

3/ If a matter went before a project consultant, his task was to determine whether WPPSS's actions conformed with prudent utility practice. PA § 16.

Finally, the participants were granted certain rights in the completed plants. They were given a share of project capability, and the right to have the plants' output adjusted to meet their needs. PA § 9. If the projects were terminated, the projects' assets were credited to the participants' accounts. PA § 13. Pursuant to this agreement, WPPSS issued $2.25 billion worth of bonds in 14 series. When the projects ran into massive cost overruns, WPPSS decided to terminate the plants prior to completion. Many of the participants then repudiated their obligations.

Chemical Bank, the trustee for the bondholders, filed a declaratory judgment action in King County Superior Court in May 1982, seeking a legal determination that the participants were contractually bound to make payments to WPPSS pursuant to the participants' agreement payment schedule.

In late 1982, the trial judge granted Chemical Bank's motion for summary judgment. He held that the participants were required to fund their respective shares of the debt service on the bonds, even if the projects were never completed. He also ruled that the participants were required to fund the costs of decommissioning the terminated projects. He further found that the Supply System and the Washington participants had statutory authority to enter into the participants' agreements. The trial judge concluded that the municipal participants' obligations were not violative of Washington's constitutional limit on incurring debt, and were not an unlawful delegation of power or authority. This court granted discretionary review and rejected the trial judge's conclusion that the Washington municipalities had authority to enter into these contracts.

The case was returned to the trial court for action in accordance with the opinion. Several defendants moved for summary judgment based on this court's mandate. The judge ordered summary judgment in favor of all the defendants. The order provided, in part:

> 1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is _ultra vires_, void _ab initio_, invalid, ineffective and unenforceable;
>
> 2. Inasmuch as the Participants' Agreement is _ultra_

> vires, void ab initio, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

Order and Judgment, August 11, 1983, at 2-3.

The court then rejected all objections and contentions raised in opposition to this motion by Chemical Bank and WPPSS, concluding that

> none of the moving defendants or any other participant defendant is obligated . . . to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS . . .

Order and Judgment, August 11, 1983, at 3.

This court granted review to resolve the issues set out above.

I

Procedural Preliminaries

A. Reconsideration of Chemical Bank I

The issue of statutory authority was addressed in Chemical Bank I. Nonetheless, appellants seek review of that decision under the provisions of RAP 2.5(c)(2).

Appellants urge that reconsideration is appropriate because of the importance of the issues raised by the case, and because reconsideration is authorized by the Rules of Appellate Procedure (RAP).

RAP 2.5(c)(2) states:

> (2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on

> the basis of the appellate court's opinion of the law at the time of the later review.

A comment to this rule notes that application of this section is mandatory when justice would be best served by a reexamination of the law at the time of the later review. The comment states prior law, referring to the predecessor rule as discretionary, is superseded.

We conclude the complexity of the statutory authority issue and the importance of this litigation to thousands of individuals require a balance between principles of finality embodied in the Rules of Appellate Procedure and the interests of those involved. Moreover, we note consideration of issues raised for the first time in this second appeal by necessity involve discussion of the issues decided in Chemical Bank

I. We will therefore first reevaluate our decision in Chemical Bank I and then turn to those issues new to this appeal. Before doing so, however, two other procedural matters must be addressed.

B. Intervention

The final issue arises from a motion by six bondholders to intervene in this action. Intervenors base their motion on the provisions of CR 24 and RCW 7.24.110.

By court rule, intervention should be permitted, upon timely application,

> (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

CR 24(a), in pertinent part.

RCW 7.24.110 states the specific rule governing declaratory judgments. It provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In Williams v. Poulsbo Rural Tel. Ass'n, 87 Wn.2d 636, 555 P.2d 1173 (1976), this statute was characterized as jurisdictional. The court held that failure to include an affected party, *i.e.*, an essential party, required remand of the case. Williams, at 643, 555 P.2d 1173. This is the relief sought by bondholders.

The motion requests "that this Court remand this action back to the trial court for further proceedings to give an opportunity for all holders and former holders of the Bonds to join this action as party plaintiffs." The proposed intervenors suggest that in such further proceedings they will be in a position to litigate claims which Chemical Bank has made, but for various reasons may be precluded from pursuing, either in state court or in federal court, or both. The complaint in intervention would also add claims not previously made in this litigation, and would bring in new defendants. The complaint states, for example, negligence and malpractice claims against engineers and attorneys.

Relying on Martin v. Pickering, 85 Wn.2d 241, 533 P.2d 380 (1975), the various responses to the motion note that it is not timely.

We note, however, the declaratory judgment statute does not have a timely exception. Also, in Williams, this court's characterization of the failure to join interested parties in a declaratory judgment action as a jurisdictional defect suggests no timely element is necessary. On the other hand, CR 24 clearly requires timely application, even when a statute confers an unconditional right to intervene. This leaves an apparent conflict between the way the statute has been interpreted and the court rule.

When statutory provisions and rules of court adopted by the Supreme Court conflict, the court rule governs. Emwright v. King Cy., 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Here, however, the conflict is not so much between the statute and the court rule as it is between our interpretation of the statute and our court rule. We believe this conflict must be resolved in favor of requiring timely application, even when intervention is a matter of right granted by statute.

First, efficient management of litigation can be achieved only by timely application.4/ Here, for instance, the bondholders' motion to intervene would require reevaluation of matters already argued by the parties and determined by the trial court. This would in turn require duplication of work by attorneys and the judicial system at a staggering cost to all.

4/ To the extent that the language in Williams v. Poulsbo Rural Tel. Ass'n, supra suggests the opposite result, it is overruled.

Second, principles of finality weigh in favor of requiring timely application. Where, as here, thousands of potential intervenors/plaintiffs exist, the defendants to the action cannot be expected to defend each action brought by bondholders dissatisfied with the initial result.

Our conclusion that timely application is required disposes of the bondholders' motion, which was not filed until this action reached the late stages of the appellate process.

We turn now to the subsidiary question of whether the bondholders are bound by the results of this litigation. The trial judge's order released all claims, including the bondholders', raised against the participants. The declaratory judgment statute, however, states that an interested party who is not joined cannot be prejudiced by the results of the declaration. Since the bondholders are certainly parties who have an interest in the litigation, we must decide whether this section of the statute will be interpteted literally. If so, that portion of the order pertaining to the bondholders must be struck.

We believe that this result would be improper, where, as here, the interested parties have a designated representative. The bond resolution stated that the bond trustee, i.e., Chemical Bank, was to represent all bondholders.5/ Chemical Bank has served

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5/ The bond resolution provided, inter alia:

"Section 11.4. Suits by Bond Fund Trustee; Direction of Action by

[Footnote continued]

in this capacity for the entire history

[Continued from previous page]

Bondholders; Possession of Projects; Receivership; Relinquishment of Control. If an Event of Default shall happen and shall not have been waived or remedied, then and in every such case the Bond Fund Trustee, either in its own name or as trustee of an express trust, or as attorney in fact for the holders of all the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, by its agents and attorneys, shall be entitled and empowered to proceed forthwith to institute such suits, actions and proceedings at law or in equity for the collection of all sums due in connection with the Bonds and to protect and enforce its rights and the rights of the holders of the Bonds under the Resolution for the specific performance of any covenant herein contained, or in aid of the execution of any power herein granted, or for an accounting against the System as trustee of an express trust, or in the enforcement of any other legal or equitable right as the Bond Fund Trustee, being advised by counsel, shall deem most effectual to enforce any of its rights or the rights of the holders of the Bonds, or to perform any of its duties under the Resolution. The Bond Fund Trustee shall be entitled and empowered, either in its own name or as a trustee of an express trust, or as an attorney in fact for the holders of the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, to file such

[Footnote continued]

of this action, and vigorously pressed the bondholders' claims. Under these circumstances, the bondholders must

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[Continued from previous page]

proof of debt, amendment of proof of debt, claim, petition or other document as may be necessary or advisable in order to have the claims of the Bond Fund Trustee and of the holders of the Bonds and of the coupons appurtenant thereto allowed in any equity, receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceedings relative to the System. For this purpose the Bond Fund Trustee is hereby irrevocably appointed the true and lawful attorney in fact of the respective holders of the Bonds and of the coupons appurtenant thereto (and the successive holders of the Bonds and of the coupons appurtenant thereto by taking and holding the same shall be conclusively deemed to have so appointed the Bond Fund Trustee) with authority to make and file in the respective names of the holders of the Bonds and of the coupons appurtenant thereto any such proof of debt, amendment of proof of debt, claim, petition or other document in any such proceedings, and to receive payment of any sums becoming distributable on account thereof, and to execute any such other papers and documents. . ."

abide by the results obtained by their designated representative. Finally, the claims intervenors raise pertain to the securities' action that is now being tried in federal court. For relief on those claims, the intervenors should seek relief in that forum. As to the contract actions, we hold that the designated representative has fulfilled the representative function contemplated by the intervenor statutes. The motion to intervene is therefore denied.

C. Scope of Judgment

Appellants contend the summary judgment order entered by the court in this case exceeded the scope of their declaratory judgment action. Chemical Bank's complaint sought

> a determination that the Supply System was obligated to make payments to the bond holders and that the Participants were obligated to make payments to the

Supply System under the terms of the Participants' Agreement.

Oral Decision, August 17, 1983.

Chemical Bank now asserts that its original pleadings sought only a judicial determination of the relationship between the parties, rather than an affirmative claim of relief. This argument is without merit. First, this theory ignores Chemical Bank's own expansion of the scope of the first action. In that action, Chemical Bank moved for summary judgment on a variety of issues. When summary judgment was granted in its favor on these issues, Chemical Bank did not allege that the order exceeded the proper scope of the pleadings.

Moreover, by expanding proceedings with their original summary judgment motion, Chemical Bank invited a determination of the parties' entire legal obligations. Chemical Bank cannot now complain that the determination against them was improper.

II

Contractual Obligations

A. Statutory Authority

As noted above, appellants' first substantive challenge is to this court's prior conclusion that the Washington municipalities and PUDs did not have statutory authority to enter into these agreements. Before addressing their specific arguments, a brief statutory review is in order.

This statutory authority issue involves 28 participants: 19 PUDs and 9 Washington cities of various classes. One category of relevant statutes grants these 28 participants authority to purchase electricity. PUDs are granted with authority under the terms of RCW 54.16.040, which provides:

> A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof: . . .

Each class of municipal participant

has similar grants of authority to purchase electricity. See, e.g., RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); RCW 35A.80.010.

The statutory provisions creating WPPSS grant an additional layer of statutory authority to purchase electricity. Those stautes allow creation of a joint operating agency which "shall have authority" (1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes (RCW 43.52.300(1)); (2) to construct, condemn, purchase, lease, acquire, operate, develop and regulate facilities for the generation of electric energy (RCW 43.52.300(2)); (3) to enter into contracts for sale, exchange, transmission or use of electric energy (RCW

43.52.330(3), (4)); and (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to so do (RCW 43.52.300(7)). These statutes are to be liberally construed to effectuate their purposes. RCW 43.52.910.

A second category of statutes grants cities and PUDs authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44. RCW 54.44.020 states that the utility or city "shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof." RCW 54.44.030 limits a participant's liability to its own acts and forbids the participant from assuming any of the other participants' debt or obligation.

Cities and PUDs may also construct energy facilities on their own. RCW 35.92.050 authorizes a city or town to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity. PUDs have similar authority to construct generating facilities under RCW 54.16.040.

After reviewing the participants' agreement in relation to these statutes, we concluded in Chemical Bank I that

> this agreement does not satisfy the statutory scheme governing the public participants. (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or

> construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retained no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy."

Chemical Bank I, 99 Wn.2d at 798-99, 666 P.2d 329.

Appellants attack this conclusion, arguing that the court did not address important facts which established control and, alternatively, that the issue of ownership control is a factual one which requires a full hearing on the merits.

Appellants first argue that all participants had statutory authority. As the critical issue to establish statutory authority is control over the project, appellants cite several of the provisions of the participants' agreement to support their theory that the participants exercised control sufficient to establish statutory authority over the projects. We recognize that the agreement did supply some control but still disagree with appellants' position that it was control sufficient to protect the interests of their ratepayers as contemplated by these statutes.

Our conclusion is based upon the reasons set out in Chemical Bank I. Also, additional evidence of the limited control exercised by respondents can be gleaned from comparing the more complete indicia of ownership and, therefore, control present in the agreement between Pacific Power & Light Company (Pacific Power) and WPPSS. Pacific Power, as a 10 percent owner of WNP 5, was, by virtue of its ownership agreement, given significant rights over and above those granted to the participants. For instance, while the participants usually had to request information, WPPSS was obligated to keep Pacific Power informed on all significant matters, to confer with it prior to developing proposals and to furnish "any and all other information relating to the planning, construction, operation or maintenance of the Project." Pacific Power & WPPSS Ownership Agreement § 3(a).

Moreover, where the participants' agreement gave respondents rights to affect proposed WPPSS actions, any proposal submitted by WPPSS to Pacific Power had to include itemized cost estimates and all supporting reports and analyses. § 3(c). Rather than a 15-day take-it-or-leave-it provision applicable to the participants, Pacific Power was given 30 days to approve proposals, and certain matters could not proceed without Pacific Power's approval. § 3(d). These included changes in any of the following: site, type of steam supply system, architect-engineer or construction manager. § 3(e). Disputes between WPPSS and Pacific Power were to be resolved in the same manner as those between WPPSS and the participants. § 4(e). The ownership contract, unlike the PA, also specifically required WPPSS to award contracts in a cost effective fashion. Finally, Pacific Power's approval was required on any contract in excess of $500,000. § 7(e). The participants' approval, on the other hand, was required only on those contracts in excess of $2 million.

In summary, the Pacific Power and WPPSS ownership agreement gave greater control to Pacific Power than that granted to the participants. Our reevaluation of the statutory authority question thus leads us once again to the conclusion that the participants' agreement did not grant ownership control as contemplated by this statutory scheme. No statutory authority, therefore, existed.

Moreover, we reject appellants' assertion that the question of ownership control is essentially a factual inquiry. The participants' agreement and Pacific Power's ownership agreement create the contractual rights of the parties. Interpretation of those agreements is a question of law. Kelly v. Aetna Cas. & Sur. Co., 100 Wn.2d 401, 670 P.2d 267 (1983).

Appellants next contend that the agreements were a valid exercise of authority under the joint operating statutes. They offer three arguments. They assert, first, that recent amendments to the statutes demonstrate legislative recognition of the municipalities' authority, citing RCW 43.52.410, which states that no city or district may enter into a contract "to purchase or participate in a portion of an electrical generating project." Appellants conclude that this amendment is a legislative recognition and therefore ratification of these debts. Next, appellants cite an amendment to RCW 43.52.550 which now provides for a repayment provision for contracts such as these. Third, appellants urge that the narrow construction the court placed on the joint operating statutes defeats their purpose.

Respondents note that appellants' arguments ignore RCW 54.44 which provides specific mechanisms for constructing nuclear plants. As discussed in detail in Chemical Bank I, we agree. In addition, we find appellants' attempts to find authority in the above-cited amendments to be, at best, a strained interpretation of those statutes. Nothing in the legislative history cited by appellants or the statutes themselves specifically authorizes these contracts. At most, the amendments represent a legislative attempt to provide orderly repayment _if_ the utilities are found to be liable for the debts. That conclusion does not logically include the proposition that the debts themselves were valid.

Appellants next contend the court erred in concluding that these contracts were not contracts to purchase electricity. Citing cases from two other states, they urge that these statutes, providing for purchase of electricity, are to be construed broadly. This issue was adequately addressed in _Chemical Bank I_ and will not be repeated here.

Similarly, arguments pertaining to legislative interpretation and implied powers were raised previously. Appellants offer no compelling reasons to alter our decision on these points.

Finally, it has been argued that the court in Chemical Bank I ignored the broad general powers granted to cities under article 11, section 11 of our state constitution. This argument is not persuasive. First, the argument has no application to two-thirds of the participants governed by our original decision.

Those participants are public utility districts and consequently do not come within the terms of Const. art. 11, § 11. Second, the argument improperly suggests that the general powers of a city may be exercised in derogation of specific statutory schemes.

Article 11, section 11 itself contemplates this limitation in that it allows cities to make only such regulations "as are not in conflict with general laws." Here, the Legislature developed extensive legislation governing the authority of cities and public utility districts to enter into contracts for the purchase of electricity and the ownership of generating plants. As discussed in Chemical Bank I, those statutes contained safeguards to protect ratepayers which were ignored. Those safeguards cannot now be subverted by misplaced reliance on general constitutional provisions.

In summary, we find that appellants' "new" arguments for statutory authority are unpersuasive. Our prior decision is therefore affirmed.

B. Ratification

Appellants' argument that the Legislature subsequently ratified these agreements is equally without merit. As a general rule, ratification requires that the act to be ratified be specifically acknowledged by the ratifying legislation. See generally E. McQuillin, Municipal Corporations § 29.10 (3d ed. 1981).

The amendments cited by appellants contain no such acknowledgement. Moreover, we cannot adopt appellants' suggestion that the amendments infer ratification. Ratification by inference is an ambiguous rule and dangerous doctrine requiring that a court second guess the Legislature. This we decline to do.

C. Contractual Obligation of Remaining Respondents

Appellants' next challenge is to the trial judge's order granting summary judgment in favor of those utilities whose contractual obligations were not before the court in Chemical Bank I.

Out of the total of 88 participants, 28 are governed by the statutory scheme described above. Since we had concluded that these utilities were not acting within the scope of their authority, the trial judge on remand was faced with the question of what effect release of the municipalities and PUDs had on the obligation of the remaining utilities. On respondents' motion for summary judgment, the judge ruled that the doctrines of failure of condition, precedent, commercial frustration or impossibility and mutual mistake all applied. These doctrines, the judge concluded, released the remaining participants' contractual obligations.

Appellants challenge this order, arguing that the trial judge's decision ignores the plain language of the contract and the applicable law. We agree that the trial judge incorrectly relied on the condition precedent analysis, but find that the doctrines of mutual mistake and commercial frustration both support his conclusion that the remaining participants were not obligated under the contract.

1. Failure of Condition. The Restatement (Second) of Contracts §224 (1981) defines a condition as an event not certain to occur which must occur before performance under a contract becomes due. An event may become a

condition by agreement or may be a term supplied by the court. § 226. The trial judge ruled that section 3 of the participants' agreement created a condition precedent to the formation of the contract. That section states that

> This Agreement shall be effective upon execution and delivery of Participants' Agreements by Supply System and Participants whose Participants' Preliminary Shares total 1.0 [100%] or more.

PA § 3. From this, the trial judge reasoned that the 100 percent (or substantially that) of the participants were required to have authority to enter into the contracts before a duty to perform could be imposed on any participant. We disagree. Section 3 does not establish authority to enter into the contract as a condition precedent to the obligation of all. Section 3 states simply that the contract takes effect when the participants' agreements are executed. Authority to enter into the contract is not mentioned in this section and was thus not made a condition precedent to the participants' obligation.

Furthermore, respondents' attempt to establish statutory authority as a condition of the contract conflicts with the accepted definition of the word "condition". The question of authority does not involve an event not certain to occur but rather a status of certain parties at the time they entered into the contract. For this reason, and that above, we conclude the trial judge erred in viewing section 3 of the participants' agreement as a condition.

2. Commercial Frustration--Impossibility. Respondents assert that section 3 of the participants' agreement contemplates 100 percent participation as a material part of the contract. They urge that this court's decision to excuse 28 participants, whose obligation was 70 percent of the total power shares, should result in the contractual release of the remaining participants under the doctrine of commercial frustration or impossibility. We agree.

Both the Restatement (Second) of Contracts and our case law recognize commercial frustration and impossibility as independent legal theories that may, on occasion, excuse a party's contractual obligations. Recently, this court recognized and applied commercial frustration. Weyerhaeuser Real Estate Co.

v. Stoneway Concrete, Inc., 96 Wn.2d 558, 562, 637 P.2d 647 (1981).

> The doctrine of commercial frustration may be summarized as follows:
>
> Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

Restatement of Contracts § 288, at 426-27 (1932). See also 18 S. Williston, Contracts § 1954 (3d ed. 1978); 6 A. Corbin, Contracts §§ 1355, 1356 (1962).

To finance, build or terminate these plants, the municipality and PUD participants were vital. Their share of the projects represents approximately 70 percent of the total obligation. Our decision in Chemical Bank I excused these obligations. As the remaining participants did not in any way contribute to this frustration of purpose, we believe contractual release of their obligation is required.

3. Mutual Mistake. The trial judge also held that the participants could be excused because all parties were mistaken about the authority of the municipalities. This court applied the doctrine of mutual mistake in Simonson v. Fendell, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). The court described the doctrine's requirements:

> A party seeking to rescind an agreement on the basis of mutual mistake must show by clear, cogent and convincing evidence that the

> mistake was independently made by both parties. Beaver v. Estate of Harris, 67 Wn.2d 621, 409 P.2d 143 (1965); Carson v. Isabel Apartments, Inc., 20 Wn. App. 293, 296, 579 P.2d 1027 (1978). A mistake is a belief not in accord with the facts. Restatement (Second) of Contracts § 151 (1981).

Restatement (Second) of Contracts § 152 (1981) notes that a contract is voidable for mutual mistake when

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
>
> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

We find that the assumption that the municipalities and PUDs had statutory authority was a mistaken assumption material to the contract. As discussed later in this opinion, all parties assumed that statutory authority existed. Moreover, the 60 respondents involved in this issue did not assume the risk that no authority existed. If anyone assumed the risk under the terms of section 154,[6] the bondholders did so. They were in a position to obtain judicial determination of the authority question, and did not seek such resolution. We conclude release of the 60 respondents is therefore warranted.

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[6] "A party bears the risk of a mistake when "(a) the risk is allocated to him by agreement of the parties, or "(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or "(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154 (1981).

III

Availability of Equitable Remedies

Before discussing the equitable obligations of the parties, however, we believe this remedy, as well as the other equitable claims against the Chemical Bank I respondents, must be placed in historical perspective.

A. Equity's History

Both sides to this dispute seek the equitable result, but what is equity? One commentator notes that the term is used in two distinct senses. In the first, the word implies right, justice or moral quality. D. Dobbs, Remedies § 2.1, at 24 (1973). In another related judicial sense, the word refers to "what was once an entirely separate body of judicial rules, procedures, remedies, and to the separate courts that administered this judicial mass." D. Dobbs, at 24.

B. Types of Equitable Remedies

1. Estoppel. Estoppel existed at common law as the principal that a person who asserted a state of affairs should not be allowed to deny the existence of that state thereafter. Equity extended this doctrine. J. Lewis, Outlines of Equity 100 (1968). The extension was adopted by the common law; and, by the 19th Century both English law and equity held that there would be estoppel where:

(a) there had been a representation by words or conduct,

> (b) of existing fact, as opposed to law, which was
>
> (c) intended to be acted upon, and
>
> (d) was acted upon to his detriment by the person to whom it was made.

J. Lewis, at 100.

English legal history recognized two distinct forms of estoppel: promissory estoppel.and estoppel by acquiescence. Promissory estoppel in England has been described as follows:

> Where by words or conduct a party to a transaction makes an assurance to the other which --
>
> > (a) is intended to affect the legal relationship existing between them; and
> >
> > (b) is acted upon by the other party who thus alters his position to his detriment;
>
> the first party will not be allowed to behave in a manner inconsistent with his assurance. Having given his promise he is estopped from deniying its validity.

J. Lewis, at 101.

A second type of estoppel found in English cases, estoppel by acquiescence, may arise "where a person incurs expenditure, or otherwise prejudices himself, in the belief, actively or passively encouraged by the other, that he had or would obtain a sufficient interest in the property to justify such expenditure." J. Lewis, at 102. This form of estoppel can be used not only as a defense but also as a right of action. J. Lewis, at 102.

Estoppel in American case law is well established but unevenly analyzed. It appears that several forms of estoppel exist. Like its English counterpart, estoppel in American case law has been sometimes limited to defensive use and sometimes used affirmatively.

First, American courts, including Washington's, recognize promissory estoppel. It is defined in Restatement (Second) of Contracts § 90(1) (1981):

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Unlike its British equivalent, however, the Restatement does not limit promissory estoppel to use as defense. Nor has Washington's case law done so. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980).

Second, Washington courts discuss equitable estoppel.[7] In *Klinke*, this court described both promissory estoppel and equitable estoppel:

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[7] Appellants, who rely on this theory, view equitable estoppel as

[Footnote continued]

> Equitable estoppel is based upon a reppresentation of existing or past facts, while promissory estoppel requires the existence of a promise. Equitable estoppel also is available only as a "shield" or defense, while promissory estoppel can be used as a "sword" in a cause of action for damages. Promissory estoppel based on Restatement of Contracts § 90 (1932) has long been recognized in this state and may serve as the basis for an action for damages.

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containing three elements: (1) an admission, statement or act inconsistent with the claim thereafter asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from admission. Beggs v. Pasco, 93 Wn.2d 682, 611 P.2d 1252 (1980). Brief of appellant WPPSS, at 57-58. As discussed above, however, we find the concept more complicated than as represented by appellants.

(Footnotes and citations omitted.) Klinke, at 258-59, 616 P.2d 644. Professor Dobbs, in Remedies 2.3 (1973), agrees equitable estoppel may be used only as a defense. He notes "estoppel is, according to the usual statement, a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped party." D. Dobbs, at 42.

Not all Washington cases have strictly adhered to this rule. For instance, in Beggs v. Pasco, 93 Wn.2d 682, 611 P.2d 1252 (1980), this court acknowledged that the doctrine of estoppel applied to municipalities and then applied it in what appears to be an affirmative manner.8/Moreover, many

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8/ A close examination of Beggs v. Pasco, supra, however, reveals that the court's conclusion that the

[Footnote continued]

cases mingle promissory estoppel with equitable estoppel. See State v. Northwest Magnesite Co., 28 Wn.2d 1, 182 P.2d 643 (1947).

Third, a specialized form of estoppel arises in a series of bond cases decided by our court and the United States Supreme Court at the end of the last century. This form of estoppel, which for clarity's sake we will term estoppel by recital, prohibits a municipality from denying the validity of its bonds

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[Continued from previous page]

> city was estopped from denying statutory retirement benefits to the plaintiffs came after the court concluded that the unchallenged findings of fact placed plaintiffs squarely within the terms of the statute. Beggs, 93 Wn.2d at 688, 611 P.2d 1252. Consequently, the affirmative relief provided by the court was based upon the statute, not the doctrine of estoppel.

under specific circumstances. As these cases are factually similar to the one at hand, a closer look at this form of estoppel is warranted.

One of the early estoppel by recital cases is Coloma v. Eaves, 92 U.S. (2 Otto) 484, 23 L.Ed. 579 (1875). In Eaves, the Court affirmed judgment for a plaintiff who purchased bonds from a municipal corporation. The bonds stated that they had been issued under and by virtue of the law of the state and in accordance with a vote of the electors of the township. In finding for the plaintiff, the Court noted that a bona fide purchaser was not obligated to look beyond such recitals. The Court quoted, with approval, the following rule from St. Joseph Township v. Rogers, 83 U.S. (16 Wall.) 644, 21 L.Ed. 328 (1872):

> "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, *if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled*."

(Italics ours.) *Eaves*, at 492. In subsequent cases, the Court reaffirmed this rule, applying it even when the bonds were issued in excess of a municipality's constitutional debt limit. *See Gunnison Cy. Comm'rs v. Rollins*, 173 U.S. 255, 19 S.Ct. 390, 43 L.Ed. 689

(1898). Accord, Cuddy v. Sturtevant, 111 Wn.304, 190 P. 909 (1920).

In explaining its rationale, the Court in Gunnison noted that the rule depended on who makes the recitals and whether their position justifies the public's reliance. The Court noted:

> If the officers authorized to issue bonds, upon a condition, are not the appointed tribunals to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

(Italics ours.) Gunnison, 173 U.S. at 267, 19 S.Ct. at 394 (quoting Dixon Cy. v. Field, 111 U.S. 83, 45 S.Ct. 315, 28 L.Ed. 360, (1884).

In addition to promissory estoppel, equitable estoppel and estoppel by recital, our case law has applied the concept to foreclose denial of certain facts or representations. To prevent injustice then, the court has evoked estoppel in pais, estoppel by misrepresentation, and laches. (See generally Arnold v. Melani, 75 Wn.2d 143, 147, 449 P.2d 800 (1968) and cases cited therein.) The multiplicity of these terms has obscured rather than clarified the law, however, and is of dubious applicability to this case. We prefer, therefore, to confine our discussion to the three forms of estoppel clearly recognized by the courts and the Restatements as separate doctrines and to the theory of unjust enrichment discussed below.

2. Unjust Enrichment. Just as the term "estoppel" has been used widely to describe a variety of legal actions, the term "unjust enrichment" is equally amorphous.

John Dawson notes that, in the English common law, relief for unjust enrichment can be found under many different names, including remedies for disseisin of land, the quid pro quo requirement in an action for debt and remedies in equity for enforcing trust or canceling transfers for fraud and duress. J. Dawson, Unjust Enrichment 9 (1951). Relief for unjust enrichment is frequently called restitution.

Restitution will be granted in a variety of circumstances, including those involving contractual relief for mutual mistake or commercial frustration. See Restatement (Second) of Contracts § 272 (1981), Simonson v. Fendell, 101 Wn.2d 88, 675 P.2d 1218 (1984).

We turn now to the application of general principles of equity to the specific facts of this case.

C. Application of Doctrines

1. Equitable Estoppel. As previously suggested, appellants contend that the general principle of equitable estoppel applies to their case because the participants made representations which were relied upon by the bondholders and resulted in injury. We need not decide whether equitable estoppel may properly be used in an

affirmative manner, as we conclude the doctrine is inapplicable. First, although equitable estoppel is sometimes applied to municipal corporations, such application is not favored. PUD 1 v. Cooper, 69 Wn.2d 909, 918, 421 P.2d 1002 (1966). This disfavor has led courts to conclude that to establish equitable estoppel, every particular must be proven by the plaintiff with clear, cogent and convincing evidence. PUD 1 v. Cooper, supra. We believe that plaintiffs have not met this burden.

We find the doctrine is inapplicable because the representations relied upon by the bondholders were representations as to questions of law, not questions of fact. As such, the bondholders should have resorted to a declaratory judgment action to determine the issue of authority. Further, even if the representations are factual, the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of those facts. Consequently, we have observed:

> In order to create an estoppel it is necessary that:
>
>> "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, *but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel*." 11 Am. & Eng. Ency. Law (2d ed.), p. 434.

(Italics ours.) *Leonard v. Washington Employers, Inc*., 77 Wn.2d 271, 280, 461 P.2d 538 (1969) (*quoting Wechner v.*

Dorchester, 83 Wash. 118, 145 P.197 (1915)).

As suggested earlier in the opinion, the question of statutory authority could and should have been resolved in a declaratory judgment action. As this was not done, the parties cannot now complain of the consequences of their neglect in the matter. For the same reason, we find that the participants are not estopped by their recitals in the bonds.

2. Estoppel by Recital. Estoppel by recital, (discussed above) leads us to the conclusion that the doctrine is a limited concept applied in very narrow circumstances. There are three requirements for the doctrine's application. First, the municipality must have authority to enter into the transaction.

See South Ottawa v. Perkins, 94 U.S. (4 Otto) 260, 24 L.Ed. 154 (1876). Second, if the plaintiff seeks to establish estoppel based on recitals in a bond, the individual or entity making such recitals must be both authorized to make those recitals, and one on whom the public should be entitled to rely for the truth of the representation. Gunnison Cy. Comm'rs v. Rollins, supra. Third, the recital, as in the equitable estoppel cases, must be one concerning facts rather than law. Appellants' case meets only one of these three requirements. Although the municipalities did have general authority to enter into the transactions, we find that the participants are not the final authority on the question of statutory interpretation created by these contracts, and that the representation was legal rather than factual. Those issues in this case are factual and are properly the jurisdiction of a court of law. We conclude that the doctrine of estoppel by recital, as developed in the last century, should not be applied here.

3. Statutory Estoppel--RCW 62A.8. Both appellants offer the provisions of article 8 of the Uniform Commercial Code in support of their theory that our statutes prohibit participants from denying payment on these obligations. The trial judge rejected this argument because he believed it was precluded by Chemical Bank I. This conclusion is not required by our decision. Thus, a detailed analysis of the issue is in order.

This argument arises from the court's repeated reference to the municipal participants as guarantors. In Chemical Bank I, the court repeatedly stated that the agreement was essentially an unconditional guaranty of payment. Chemical Bank I, 99 Wn.2d at 784, 786, 798, 666 P.2d 329. RCW 62A.8-201(2) provides that a "guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security." The conclusion that a guarantor is an issuer is important because it triggers the provisions of RCW 62A.8-202. That section provides:

> (1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and those made part of the security by reference to another instrument, indenture or document or to a constitution, statute, ordinance,

rule, regulation, order or the like to the extent that the terms so referred to do not conflict with the stated terms. Such a reference does not of itself charge a purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.

(2)(a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.

(b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a

> stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

RCW 62A.8-202(1),(2). Comment 6 to the rule states that the rule is based on the estoppel by recital cases discussed above. The Washington comment to this section states that the statute has substituted two criteria for the recital requirement. First, there must be substantial compliance with the statute's governing issue. Second, the municipality must have received substantial consideration and the stated purpose must be within the power of the issuer. See Comment, RCWA 62A.8-202.

Respondents assert that this statute is inapplicable. They first argue that the participants are not issuers. Several theories are offered to support this proposition, none of which we find persuasive. They allege, for instance, that the participants are not guarantors because the only basis for finding a guarantor relationship is the participants' agreement which this court has already ruled invalid. Respondents' arguments are circular and not supported by authority.

Respondents' next argument for evading the terms of RCW 62A.8-202(2)(b) is that no securities have been challenged, because everyone admits the validity of the bonds. Respondents have repudiated only the participants' agreement, and this agreement has already been determined not to be a security by the trial judge. Because this conclusion was not challenged on appeal, respondents assert that it is now the law of the case. This argument is appealingly simple. It ignores, however, the history of this case which, originally, came to this court on discretionary review of an interlocutory order. As such, appellants were not obligated to appeal every adverse decision against them. Furthermore, this court narrowly tailored the issues on review in Chemical Bank I. Thus, it would be unjust to preclude the argument on procedural grounds. Respondents' argument is therefore rejected.

Nonetheless, we agree that the PA does not fall within the terms of RCW 62A.8-202. We conclude the PA does not meet the statute's definition of a security. RCW 62A.8-102 defines the word security very narrowly. It states:

> (1) In this Article unless the context otherwise requires
>
> (a) A "security" is an instrument which

(i) is issued in bearer or registered form; *and*

(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; *and*

(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; *and*

(iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of issuer.

(Italics ours.)

The participants' agreements are not issued to a bearer, they are not registered or commonly dealt in as a medium for investment, and are not one of a class. In fact, of the above requirements, only (iv) applies to the participants' agreement. Appellants argue, nonetheless, that the participants' agreement was an integral component of the bonds and therefore should be considered as falling within the parameters of this statute. Appellants cite no case authority[9] for this proposition and offer no compelling policy reasons for extending the definition of security to this agreement.

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[9] Appellants cite RCW 62A.8-201(2) to support their allegation that the participants' agreement is part of the security. That section states:

> (2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security.

This section does not address, however, a situation where, as here, the invalidity is in the separate agreement rather than the security. We decline, therefore, to read this section as suggested by appellants.

We conclude that the participants' agreement does not meet this definition. RCW 62A.8-202 is therefore inapplicable.

D. Unjust Enrichment

As noted above, a party must make restitution when he has been unjustly enriched at the expense of another. Restatement of Restitution § 1 (1937). The Restatement (Second) of Restitution § 1 (Tent. Draft No. 1, 1983) contains a slightly different formulation of this general principle. It states:

> A person who receives a benefit by reasons of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Each of these statements, however,

involves the transfer of benefit from one party to another. It does not require, as respondents infer, that the benefit still exist. As noted in comment b to the Restatement of Restitution § 1 (1937),

> [a] person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Restatement, at 12.

The definition of benefit is critical to appellants' argument because respondents allege that the bondholders did not confer a benefit on the participants. This argument and the related question of whether justice requires restitution in this case will be addressed later in the opinion. We turn first, however, to an argument which pertains only to those respondents whose contractual obligations were held to be ultra vires by our decision in Chemical Bank I.

Respondents, citing 10 E. McQuillin, Municipal Corporations § 29.04 (1981) and Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968), contend that the unjust enrichment theory cannot be against a municipality where the acts are substantively ultra vires. We agree and, for the reasons set out below, find the acts substantively ultra vires.

A substantive/procedural dichotomy appears in virtually every ultra case.10/ The general rule, stated most

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10/ As noted throughout this opinion, courts often grant relief against a

[Footnote continued]

recently in Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982), states that a private party, acting in good faith, may recover from a governmental agency if the agency "had the power it sought to exercise but merely . . . exercised it in an irregular manner or by unauthorized procedural means", and the action was not malum in se, malum prohibitum or manifestly against public policy. Noel, at 381, 655 P.2d 245. Not surprisingly, both sides assert that

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> municipality under the various equitable theories discussed above. Each equitable doctrine seems to adopt this procedural versus substantive dichotomy, however. Thus, though the discussion of the distinction is contained in this section of the opinion, the conclusion that the acts were only procedurally ultra vires applies to the other theories herein discussed.

this rule supports their position. Appellants argue that the municipalities had broad general statutory authority to enter into contracts for purchase of electricity and generating plants. They conclude that the only error was a procedural one, that is, the contracts did not clearly set out a sufficient ownership interest to protect ratepayers. Respondents counter with the allegation that Chemical Bank I already decides the issue of whether the contracts were procedurally or substantively ultra vires.

We believe the instant case falls within this rule. As we concluded in Chemical Bank I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." Chemical Bank

I, at 799, 666 P.2d 329. If the contracts had been for these purposes, the participants would have had statutory authority. They were not. The doctrine of substantively ultra vires activity thus precludes recovery.

As noted above, a Restatement's definition of benefit is quite broad. Thus, our task here is to determine whether any asserted benefits fall within this definition. We conclude they do not.

We find persuasive respondents' theory that the benfits of the bond revenues flowed to WPPSS and no further. WPPSS contracted with the bondholders, received their money and appropriated it for its purposes. We can see no benefit to the participants in these circumstances.

In summary, we find no benefit passed to the respondents and, thus, justice does not require restitution. Moreover, restitution against those respondents released by our decision in Chemical Bank I is precluded because their activities were substantively ultra vires.

IV

Constitutional Claims

Appellants assert that the United States Constitution and the Washington State Constitution would be violated if they are denied relief. Appellants do not rely directly on any one provision of the constitutions but instead extract general principles from cases under the contract clause, U.S. Const. art. 1, § 10, cl. 1; the takings clause, U.S. Const., amend. 14, § 1; and the due process clause, U.S. Const. amend. 14, § 1. Appellants' arguments depend upon reading the various clauses together. No case has done so. Moreover, authority cited in appellants' briefs do not support their theory. For instance, Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) involved a simple application of the takings clause to action by the federal government. Petitioner, Kaiser Aetna, leased and improved a private tidal pond which had no access to the ocean. After petitioner dredged the pond, created ocean access and a marina, the federal government sought to enforce a public right of access to the pond. The Supreme Court held that this could not be done without compensation to petitioner. Kaiser thus supports only the proposition that the government may not take private property without compensation. Here, no taking occurred.

Likewise, the State has not impaired a contract obligation. When a city acts beyond its specific statutory authority, no contract obligation is created. The contract is void. Chemical Bank I.

Appellants' due process argument is equally unpersuasive. No cases have held that a court's ruling, as a matter of law, that a contract is unenforceable, violates due process. In summary, the rule suggested by appellants would effectively vitiate a court's ability to invalidate contracts. This we decline to do.

We find that the bondholders' interests have been adequately represented in this case. Their motion to intervene is denied. We reject appellants' attacks on our decision in Chemical Bank I and their equitable arguments. The trial judge's decision is affirmed.

WILLIAM H. WILLIAMS, C.J. and BRACHTENBACH, DORE, DIMMICK and PEARSON, J.J., concur.

UTTER, J. (dissenting) --

I dissent from the majority's conclusion that this court should not review its holding reached in Chemical Bank v. WPPSS, 99 Wn.2d 772, 666 P.2d 329 (1983). The provisions of RAP 2.5(c)(2) clearly authorize reconsideration.

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

The history of this rule indicates it was adopted by this court for precisely the situation we now face, a situation where adherence to the earlier ruling as the rule of the case would be both unwise and a perpetuation of earlier error. As of the date of this opinion, at least four scholarly publications have reviewed the court's initial opinion and all four are critical of its conclusion and the reasoning used to justify it. Comment, Chemical Bank v. WPPSS: A Case of Judicial Meltdown, 5 J. Energy L. & Pol'y 273 (1984); Comment, Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine, 8 U. Puget Sound L.Rev. 59 (1984); Note, A Cry for Reform in Construing Washington Municipal Corporation Statutes, 59 Wn. L.Rev. 653 (1984); Note, Chemical Bank v. Washington Public Power Supply System: The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations, 69 Cornell L. Rev. 1094 (1984). Events occurring since publication of our first opinion make clear it will in no way spare the people of this state continuing costs of litigation and exposure to liability. On October 15, 1984, investors who bought bonds for WNP 4 and WNP 5 filed a claim for $7.25 billion against the State of Washington. The entire populace of the state is now potentially liable, including those areas that specifically rejected participation.

The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event they do, the United States Supreme Court should exercise its discretion and accept this case for review. Our court's action is similar to that taken by many state courts in the Reconstruction era which were reversed on constitutional grounds by the United States Supreme Court.

In Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 17 L.Ed. 520 (1863), the Supreme Court rejected the Iowa Supreme Court's refusal to enforce railroad bonds.

> [I]f the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

Gelpcke, at 206. Many subsequent decisions during the Reconstruction era went even farther. See generally C. Fairman, History of the Supreme Court of the United States, 918-1116 (1971).

The Supreme Court continues to invoke the takings clause and the contracts clause to protect citizens from the transfer of private property to public purposes by governmental action. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358, (1980); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). In this century, most takings and contracts clause cases respond to legislative, not judicial action. Nonetheless the United States Supreme Court continues to recognize that state courts may not "redefine" as public what had been vested public rights. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. at 164, 101 S.Ct. at 452 (restraining Florida Supreme Court from "transform[ing] private property into public property without compensation").

I

I disagree with the majority on a number of grounds in its ruling that the Washington public utility districts (PUD's) and Washington municipal participants lacked authority to enter into their respective agreements. Although it is difficult for this court to admit it was in error in the largest case to come before this court in its history, we should do so now. By so doing we would let the normal legal processes resolve this dispute on the facts and the law which should be applied.

A

The majority opinion throws into confusion a body of municipal law carefully developed over many years prior to this case which granted to municipalities broad authority in the exercise of their police powers. This power to manage their own affairs, subject to broad legislative guidance, has been carefully built into our constitution, statutes and case law. Our own recent cases, not mentioned by either majority opinion, confirm this. Issaquah v. Teleprompter Corp., 93 Wn.2d 567, 611 P.2d 741 (1980) and United States v. North Bonneville, 94 Wn.2d 827, 621 P.2d 127 (1980).

Prior to Chemical Bank I, this court liberally construed powers given to first class and code cities.

Winkenwerder v. Yakima, 52 Wn.2d 617, 622, 328 P.2d 873, 878 (1958). RCW 35.20.900. In determining whether municipalities were given certain powers to act, we have liberally applied the "reasonable necessity test" where police power actions are involved. Scott Paper Co. v. Anacortes, 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978); Hunter v. North Mason High Sch., 85 Wn.2d 810, 817, 539 P.2d 845, 849 (1975).

By finding no express authority to enter into the participant's agreement in Chemical Bank I, this court did not comment on several earlier accepted rulings. In the majority opinion, first class and code cities were given the same restrictive interpretation of their statutory authority as were other cities. This is contrary to our own consistent line of earlier authority. Winkenwerder v. Yakima, supra.

The majority inadequately deals with our previous holdings which have placed actions involving public works within the liberally interpreted police powers of cities, counties and towns. Housing Auth. v. Seattle, 56 Wn.2d 10, 15, 351 P.2d 117, 120 (1960); Kaul v. Chehalis, 45 Wn.2d 616, 625, 277 P.2d 352, 357 (1954); and Morse v. Wise, 37 Wn.2d 806, 810-11, 226 P.2d 214, 216 (1951).

The court in its majority opinion also erroneously interprets the legislative intent expressed in our statutes that authorize certain municipal corporations to construct, acquire and operate electric generating facilities. RCW 35.92.050 and 54.16.040. These statutes focus on control over the electricity produced, rather than on control over the facilities, as emphasized by the majority.

The legislative declaration requiring broad construction of joint operating agency statutes is ignored by the majority. See RCW 43.52.910. Instead, its opinion strictly construes RCW 43.52 to achieve what I believe is a nonexistent distinction between powers of a joint operating agency and powers of its participants. RCW 43.52.910.

I also disagree with that portion of the majority opinion dealing with implied statutory authority. Contrary to our general liberal interpretation of police power statutes, the court relied on taxation, not police power decisions, to hold that the test for implied powers is legal necessity instead of the fairly implied or reasonable necessity test. See, e.g., Scott Paper Co. v. Anacortes, 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978). Taxation cases are totally inapplicable inasmuch as they rely on different constitutional provisions than the police power cases. Const. art. 7, §§ 5, 9; art. 11, § 12. In Hillis Homes, Inc. v. Snohomish Cy., 97 Wn.2d 804, 809, 650 P.2d 193, 195 (1982), the court required express statutory authority under the wording of article 11, section 12, a taxation provision. On the other hand, Const. art. 11, § 11 provides:

> Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

This section is effective without

legislative enactment and is a more direct grant of authority than that found in the taxation sections. Patton v. Bellingham, 179 Wash. 566, 570, 38 P.2d 364, 365 (1934). This court's earlier attempt to distinguish Municipality of Metro Seattle v. Seattle, 57 Wn.2d 446, 460, 357 P.2d 863, 872 (1960) fails, due to its basic error which confuses tax cases with police power cases.

Serious questions remain regarding the impact of our decision, if unchanged, on future Washington law. Note, A Cry for Reform in Construing Washington Municipal Corporation Statutes, supra at 667-669. Any action not backed by the clearest express authority may well be found to be ultra vires. Legal opinions regarding municipal authority will be difficult to give and municipal projects, without legislative or judicial approval of municipal authority, difficult to market. Municipal corporations are deprived of the opportunity for innovative solutions to their problems in the absence of a clear expression of legislative or judicial approval. The decision provides a fertile ground for judicial challenge to major municipal undertakings and limits the ability of municipal corporations to work between themselves to solve their common problems. Declaratory judgment proceedings will increase, of necessity, adding to overcrowded court dockets, diversion of scarce judicial resources and increased cost to taxpayers of time and money.

Most seriously, municipal corporations will be required to increasingly ask for legislative clarification of their authority. Given the Legislature's limited schedule, significant time lags between identification of problems and legislatively authorized solutions will be commonplace.

B

There are some 28 Washington municipalities and PUD's as participants involved in Washington Public Power Supply System (WPPSS). The question of whether they had statutory authority to enter into their respective agreements was the subject of Chemical Bank I. Of these participants, 19 are PUD's and 9 are Washington cities of various classes. PUD's are granted authority to purchase electricity under the terms of RCW 54.16.040.11/ Each class of

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11/ RCW 54.16.040 provides:

[Footnote continued]

municipal participant had similar grants

[Continued from previous page]

"A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmissions and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof: Provided, That the commission shall not supply water to a privately owned utility for the production of electric energy, but may supply, directly or indirectly, to an instrumentality of the United States government or any publicly or privately owned public utilities which sell electric energy or water to the public, any amount of electric

[Footnote continued]

of authority to purchase electricity. *See*, *e.g.*, RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); and RCW 35A.80.010.

In addition to the previously cited authority, the statutes creating WPPSS add an additional layer of statutory authority to purchase electricity. Creation of a joint operating agency is authorized which "shall have authority"

[Continued from previous page]

energy or water under its control, and contracts therefor shall extend over such period of years and contain such terms and conditions for the sale thereof as the commission of the district shall elect; such contract shall only be made pursuant to a resolution of the commission authorizing such contract, which resolution shall be introduced at a meeting of the commission at least ten days prior to the date of the adoption of the resolution: *Provided further*, That it shall first make adequate provision for the needs of the district, both actual and prospective."

(1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any and all such purposes, RCW 43.52.300(1); (2) to construct, condemn, purchase, lease, acquire, operate, develop and regulate facilities for the generation of electric energy, RCW 43.52.300(2); (3) to enter into contracts for sale, exchange, transmission or use of electric energy, RCW 43.52.300(3), (4); (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to do so, RCW 43.52.300(7). The Legislature mandated that these statutes be liberally construed to effectuate their purposes. RCW 43.52.910.

A third category of statutes grants cities and PUD's the authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44.020 requires that the utility or city

> shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof.

That chapter limits the participant's liability to its own acts and forbids the participant from assuming any of the other participant's debt or obligation. RCW 54.44.030.

A fourth category grants cities and PUD's authority to construct energy facilities on their own. They are authorized by RCW 35.92.050 to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity.

The court's opinion in Chemical Bank I, reasoned that the participant's agreement with WPPSS failed to satisfy the statutory scheme governing public participants for a number of reasons. The majority held: (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retain no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy". Chemical Bank I, at 798-99, 666 P.2d 329.

I have previously stated why, as a matter of law, I believe the majority was incorrect. The majority in Chemical Bank I is also in error when it assumes, as a matter of fact, that ownership, or its equivalent in terms of control, did not exist under the facts of the case.

At Chemical Bank I, pages 787-88, 666 P.2d 329, the majority, in referring to the complexity of budgets and construction decisions, states that it was "unlikely that a part-time committee . . . could provide significant input" and asserts that the participants' committee "apparently served as a rubber stamp".

For the majority to resolve these issues as factual conclusions violates Washington Constitution article 4, section 6 which gives to the trial courts the sole authority to decide factual issues.

> Factual disputes are to be resolved by the trial court. . . . The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. If we were so disposed, but we are not, we are not authorized to substitute our judgment for that of the trial court.

Stringfellow v. Stringfellow, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960).

The majority in Chemical Bank I, and today, incorrectly relies on Kelly v. Aetna Cas. & Sur. Co., 100 Wn.2d 401, 670 P.2d 267 (1983) to justify this court's authority to resolve issues of ownership control by characterizing them as questions of law rather than fact. The interpretation of the participants' agreement, the majority asserts, is solely a matter of law. Its statement of the law contained in Kelly is incomplete, however, for the interpretation or legal effect of a contract is a matter of law for the court only in the absence of disputed facts. Yeats v. Estate of Yeats, 90 Wn.2d 201, 580 P.2d 617 (1978); Epperly v. Seattle, 65 Wn.2d 777, 399 P.2d 591 (1965). See generally

4 S. Williston, Contracts § 616 (3d ed. 1961); 3 A. Corbin, Contracts § 554, 595 (1960 & Supp. 1984).

In Kelly, an insurance law case, the Washington Supreme Court found summary judgment appropriate where a complete factual record had been developed and no dispute other than the legal meaning of a term contained in an insurance policy existed. The court found the interpretation of the term "owner" to be a question of law. The decision in Kelly is consistent with the established legal principle that the interpretation or legal meanings of specific terms within insurance contracts is generally a question of law. See Pacific Indem. Co. v. Bloedel Timberlands Dev., Inc., 28 Wn. App. 466, 624 P.2d 734 (1981); see generally E. Farnsworth, Contracts 515-517 (1982). In Kelly, we engaged in no weighing of evidence or trying of facts.

Unlike Kelly, the present case presents numerous factual disputes which go well beyond the mere legal definition of terms. Since numerous factual questions relating to the actual operation of the participants' agreement exists, consistency with both Washington contract and constitutional law requires that a full factual record be developed and that all factual disputes be resolved at the trial level.

Even if the majority correctly resolved the issues of ownership and control, however, it did not by so doing answer all of the necessary issues that remained before the court for decision. As a matter of statutory interpretation, not all the statutes pertaining to the PUD's and municipalities require ownership. Some, such as RCW 35.92.050, on their face authorize schemes similar to the participants' agreement. While the first portion of RCW 35.92.050 speaks to ownership interests, the statute also states that a city or town may

> authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

This provision was an integral part of Judge Coleman's decision at the trial level, is not adequately dealt with by the majority, and provides authority for the participants to act.

As another alternative, were this court to find the majority's conclusions in Chemical Bank I correct, appellants argue that, on the record, 20 of the participants had control by virtue of their membership in WPPSS. Those 20 participants represent 68 percent of the project's shares and held 88 percent of the voting power on WPPSS. As to these participants, the statutes governing WPPSS grant them both ownership and management control over the projects. See RCW 43.52.370 and 43.52.374 (management and control of joint operating agency vested in a board composed of member utilities and outside directors); RCW 43.52.360 (after dissolution, members hold assets as tenants in common). The majority in Chemical Bank I also failed to address itself to this argument.

Given this degree of control over the projects by the large majority of the participants, this court was in error in concluding as a matter of law, without further factual inquiry, that these participants lacked sufficient control over the projects to protect their ratepayers.

Even if the majority's conclusions that the participants did not have an ownership interest in WNP 4 and WNP 5 was correct, the participants' committee provided the participants with a vehicle to exert their management control. Although I cannot disagree with the majority's determination that "the participants' committee apparently served as a rubber stamp for WPPSS decisions," Chemical Bank I, 99 Wn.2d at 788, 666 P.2d 329, courts have consistently recognized in securities litigation that investors who fail to exercise opportunities for control available to them cannot later claim they lacked control. See, e.g., Mr. Steak, Inc. v. River Creek Steak, Inc., 460 F.2d 666 (10th Cir. 1972), aff'g 324 F.Supp. 640 (D. Colo. 1970). Absent documentation that their attempts to control debt exposure through the WPPSS participants committee were frustrated, this court and the federal courts should not permit the participants to argue they had no management control.

For all the above stated reasons, I would affirm the summary judgment granted by the trial court in all respects. Our failure to find authority exists for the participants to enter into the agreements raises serious questions as to the basis upon which Washington nuclear power plants 1, 2 and 3 were built. These plants were built with the same basic agreements as those entered into by the participants in WNP 4 and WNP 5, with the added benefit of net billing. If the participants did not have authority to enter into the agreements for plants 4 and 5, they could not now assert the right to participants' shares in a working plant. Such a conclusion could well force the Bonneville Power Authority to seize the participants' interests in plants 1, 2 and 3.

C

By ruling only on the authority issue, the court in Chemical Bank I did not address the other issues before the court in that case. The lower court's ruling should be discussed on these matters inasmuch as it was correct in every aspect and the factual issues remaining to be resolved should proceed to trial.

The trial court did not abuse its discretion in deciding to strike the jury demand. Its reliance on Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980), was proper. There we noted "[i]n determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." Brown, at 368, 617 P.2d 704. The trial judge explicitly applied in his analysis the factors required in the Brown case. He first considered that the issues raised were an affirmative defense, but looked beyond the pleadings to the true nature of the allegations and concluded that this was, in fact, an action for rescission.

The court acted within its authority and no showing has been made that there was a reversible abuse of discretion. The record supports its conclusion that the participants' equitable affirmative defense was to seek rescission of the contract and that this is not a case of a defendant attempting to destroy the right to a jury by asserting equitable defenses; that participants seek both equitable relief and a jury; that the main issues are equitable; that the equitable issues are complex; that only the equitable issues remain to be tried if the other aspects of its ruling are upheld; that the overall nature of the action is not doubtful; and lastly, that the real issues in dispute are equitable.

The trial court also properly determined that the liabilities incurred by the participants did not exceed statutory or constitutional debt limitations. The determinative issue is whether the participants' liabilities are a debt for constitutional debt limitation purposes. This court has defined "debt" in the context of article 8 to mean "borrowed money; it denotes an obligation created by the issuance of paper bearing a different label." State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 668-69, 399 P.2d 319 (1965). We have in the past consistently held that the provisions of article 8, section 6 of the

Washington Constitution do not apply under revenue financing conducted through the bases of the "special fund" doctrine. The rationale behind this exemption is that obligations payable not from the general tax revenues but from a special fund are not debts of the municipality in a constitutional or statutory sense. State ex rel. State Fin. Comm. v. Martin, 62 Wn.2d 645, 661, 384 P.2d 833 (1963). The parties designed this revenue bond program to conform to the requirements of the special fund doctrine. The source of the payments on the bond are either (1) revenues generated from the projects, or (2) revenues pledged by participating public utilities. As such, according to our previous rulings, the participants' obligations do not fall within the constitutional or statutory debt limitations.

Finally, the trial court properly held that the contracts obligate the participants to pay costs of decommissioning in debt service. Decommissioning costs refer to payments to contractors for work done on the projects as well as payments to settle contracts interrupted when the projects terminated. (Participants' Agreement (PA) § 13(a)(ii), at 36-37). Debt service refers to the principal and interest payments to the bondholders.

To resolve whether the trial court correctly interpreted the obligation of the participants to pay the costs of decommissioning in debt service requires an examination of the participants' agreement and bond resolution.

Interpretation of the agreement is governed by the fact that the projects were terminated pursuant to section 13 of the participants' agreement but that termination occurred prior to the completion of the projects. Project financing was structured so that payment sources depended upon whether the project was under construction, operating or terminated. There are three key definitions involved: "contract year"; "billing statement" and "annual budget".

"Contract year" as defined in the participants' agreement starts on the earliest of three dates: "(i) the earlier of the Dates of Continuous Operation of any of the Plants or (ii) on July 1, 1988, or (iii) the date one year after the date of termination of the

Project as provided in Section 13". PA § 1(g), at 7. These trigger dates represent the possible commencement of participant payments. After the contract year begins, the monthly billing statement determines the amount to be paid the supply system by the participant. PA § 1(b), at 4-5. That amount is calculated by showing each participant's monthly installment and as determined by multiplying their share by the total amount of the annual budget. Finally, annual budget is defined as:

> "Annual Budget" means the budget adopted by Supply System pursuant to Section 8(b) with respect to the Projects and which itemizes the estimated costs of each Project, commencing with (i) the Date of Continuous Operation of the Plant related to such Project, or (ii) July 1, 1988, or (iii) the date one year after the date of termination of a Project as provided in Section 13, whichever is earliest, exclusive of

> costs of construction as defined in the Bond Resolution, and costs of fuel, applicable to the respective Contract Year . . . The Annual Budget, as amended from time to time, shall make provision for all such Supply System's costs, including accruals and amortizations, resulting from the ownership, operation and maintenance of the Projects, repairs, renewals, replacements, and additions thereto and costs of termination thereof as provided in Section 13, together with the amounts over or under billed in accordance with subsection (b) below. The Annual Budget shall include, but not be limited to, (i) the amounts which Supply System is required under the Bond Resolution to pay in each Contract Year into the various funds provided for in the Bond Resolution from the Revenue Fund, as therein defined, for debt service and all other purposes. . .

PA § 1(a), at 3-4.

Prior to the three possible trigger dates, which were (1) 1 year after the termination of the project; or (2) July

1, 1988; or (3) the date of continuous operation of a plant, payment of the project's costs were not made by participants. Instead, bond proceeds were used. However, after the so-called trigger dates, participant payments are required to begin through the annual budget.

The trial court correctly determined that under the applicable provisions of the participants' agreement, decommissioning costs are unequivocably included in the annual budget. The projects were correctly terminated pursuant to section 13 of the participants' agreement which requires WPPSS to begin decommissioning the projects and make monthly accounting statements to the participants. The annual budget definition expressly includes "costs of termination thereof as provided in Section 13". PA § 1(a), at 4. The final accounting section 13 requires is a final report to the participants as to any remaining decommissioning costs.

The agreements established successive sources of payments to the bondholders for the costs of debt service. First, when bonds are being sold to finance the projects, Bond Resolution (BR) § 6.8A2, at 42-43, requires WPPSS to pay from bond proceeds into the bond fund amounts necessary to provide for payment of interest on the bonds. These payments are defined as a "cost of construction." BR § 6.9F, at 46. It is apparent these provisions were drafted to anticipate ongoing construction and bond sales. Inasmuch as these two activities are not indefinite, the parties provided for three "trigger" dates at which time alternative means of funding would be used. Under section 6.2 of the bond resolution, that date is the earliest of: (1) one month from the date of continous operation (at which time operating revenues, at least in part, would begin to pay for the debt); or (2) July 25, 1988 (the presumed latest date for construction to be completed); or (3) one year after the date of termination. BR § 6.2A(1)-(3), at 29-31. As structured, there were "successive" sources of payment depending upon whether the projects were under construction, operating or terminated. Because the plants were terminated in January of 1982, the third alternative source would apply.

Under this latter provision, WPPSS must pay from the revenue fund to the bond fund "cost[s] of termination", i.e., amounts necessary to satisfy the debt payments. BR § 6.2A(3), at 31. The definition of annual budget in the participants' agreement expressly includes "debt service", PA § 1(a), at 4, which means the participants must pay these amounts.

Petitioners make several arguments. Their argument that the documents do not provide for "dry hole" risks is erroneous. The bond resolution provides for payment from "money pledged hereunder" which includes, by necessity, participants' revenues and does not depend on revenues generated by the project or general obligation bonds. Appellants argue that the costs of construction are explicitly exempted from the annual budget, PA § 1(a), at 3, which means that debt service is payable only from amounts properly payable to the revenue fund. The trial court correctly found that BR § 6.2A(3) resolves this problem. Finally, petitioners argue they are not obligated to pay for any debt service because the annual budget definitions limits debt service to payments from the "revenue fund". PA § 1(a), at 4. Respondents correctly point out that section 6.1 only defines what goes into the revenue fund, but that under section 6.2, WPPSS is required to pay for all unfunded debt service. Participants' pledged revenues must be used to pay those obligations.

For the foregoing reasons, I would affirm the initial ruling of the trial court which leaves for trial the equitable defenses asserted by the respondents. I would also deny bondholders' motion to intervene.

II

While I agree with a major part of the discussion by the majority regarding the history of the development of equitable remedies, it is important to first note that the history of our legal system suggests several general principles which shape the application of equitable relief. First, although lawyers generally speak of law and equity as separate concepts, history belies this characterization. Law and equity had common origins and goals. _See_ _generally_ W. de Funiak, _Modern Equity_ 6 (2d ed. 1956); F. Maitland, _Equity_ 15 (1949). They were brought to

England via the Normans, diverged as the need arose to preserve individual jurisdiction and emerged again as that need abated. F. Maitland, supra. Second, each legal system attempted to do justice within the confines of its procedural limitations and each, at some point, was more rigid in its rules than the other. G. Keeton & L. Sheridan, Equity 3 (1969). Third, both legal systems seem to have borrowed from each other during the period in which they had separate identities. Since that time, both systems have adopted concepts wholesale. One rule, common to both, is the proposition that the law will enforce promises.

Washington has consistently recognized equitable principles and enforced promises in specific circumstances. Our courts have stated: Equity will not suffer a wrong to be without a remedy, Rummens v. Guaranty Trust Co., 199 Wash. 337, 346-47, 92 P.2d 228 (1939); equity treats that as done which by agreement is to be done, Fleishbein v. Thorne, 193 Wash. 65, 72, 74 P.2d 880 (1937); and he who comes into equity must come with clean hands, Langley v. Devlin, 95 Wash. 171, 187, 163 P. 395 (1917). To enforce these maxims, our legal system developed specific rules recognized in Washington law and elsewhere and described in part in the discussion in the majority.

There are two equitable theories which I believe warrant recovery by the appellants. Although majority correctly concludes that RCW 62A.8-201 is inapplicable, RCW 62A.8 and our history of common law estoppel point to another theory or recovery raised by implication in the briefs of the appellants. That theory, recognized long ago in English courts of equity, and now embodied in Restatement (Second) of Contracts § 90 (1981), states that a promise which the promisor should reasonably expect to induce action on the part of the promisee is binding if injustice can be avoided only by enforcement. Like equitable estoppel, our courts have acknowledged that under the right facts, the doctrine may be applied against a municipality. See State v. Northwest Magnesite Co., 28 Wn.2d 1, 26, 182 P.2d 643 (1947). See also Annot., Promissory Estoppel, 48 A.L.R.2d 1069, 1086 (1956).

Promissory estoppel has four elements: a promise, foreseeability of reliance on that promise, actual reliance, and a finding that the reliance was justified. Comment, Promissory Estoppel in Washington, 55 Wash.L.Rev. 795 (1980). We find each element present here.

Appellants have repeatedly alleged, and respondents cannot deny, that they made unequivocal promises to pay these debts. Section 6 of the participants' agreement states in clear, definite language that the participants would make payments under the agreement whether or not any of the projects were completed. Reliance on that promise was not only forseeable, it was intended. In the bond resolution (approved by the participants), potential bondholders were told that the plants were being developed for the participants, and that the participants pledged their revenues as security for the bonds. Each bond resolution was approved by the participants through their committee. See Bond Resolution, at 9. That there was actual reliance on the participants' promises cannot be doubted. The bondholders' collective purchase of $2.25 billion worth of bonds amply demonstrates that fact.

The final promissory estoppel prerequisite, that the reliance be justifiable, must, when viewed against the parties' course of conduct for the 5 years prior to termination, be answered in the affirmative. Until the plants were terminated, all concerned assumed that the parties had the requisite statutory authority. The bonds were freely traded and interest payments timely made. Only when the plants were actually terminated did the participants attempt to avoid their promise to the bondholders. And, only with this court's opinion in Chemical Bank I, was the issue of statutory authority resolved.

Under these circumstances, I believe the participants' promise must be enforced to the extent that justice requires. My conclusion rests not only on the Restatement § 90 provision but also upon the public policy embodied in RCW 62A.8-201. While I reject the notion that the participants' agreement constitutes a security, I recognize that RCW 62A.8-202 reflects a clear legislative intent that municipalities as well as individuals be held responsible for their promises and actions.

I believe the same general limitations contained in RCW 62A.8 and cases concerning equitable estoppel should be adopted in applying the doctrine of promissory estoppel. Thus, the promise must be within the promisor's general power. See RCW 62A.8-201(2). Such is the case here. In this court's original majority opinion, we acknowledged the participants' general authority to enter into contracts to build nuclear power plants and to take the actions necessary to fund those plants but held that the participants had acted improperly in entering the dry hole contract. Chemical Bank I, 99 Wn.2d at 784, 666 P.2d 329. Also, we recognize that the statutes contemplate general authority to act in this area. See RCW 35.92.050, RCW 43.52.300(1).

The majority concludes that the doctrine of unjust enrichment does not apply because the acts of the appellants were substantively ultra vires. The majority concludes that Chemical Bank I has already decided the issue of whether the contracts were procedurally or substantively ultra vires. I cannot agree.

When the term "substantive authority" was used in Chemical Bank I, it was not used in the sense of deciding whether it was procedurally or substantively ultra vires because that issue was not before us. In the past, this court has differentiated between substantive and procedural ultra vires through use of the adjectives primary and secondary. The first classification (substantive or primary) refers to acts a municipality has no authority whatsoever to perform. In the second classification fall those acts which are within the lawful powers of the municipal corporation, but which are void because of an irregularity in the procedure leading up to the act. Jones v. Centralia, 157 Wash. 194, 218, 289 P. 3, 11 (1930). Whether these acts were primary or secondary ultra vires should not be decided summarily and requires further discussion.

The classic application of the primary ultra vires doctrine involves the invalidation of actions that directly contravene express constitutional or statutory provisions. The doctrine's harsh results make sense upon examination of the common law basis for the doctrine. Premised on the fundamental difference between the private and public sectors, application of the doctrine exhorts a private contractor to ascertain the authority and limitations of a municipal corporation. *See*, Note, *An Aberration in Washington's Application of the Ultra Vires Doctrine*, *supra* at 60-76.

One of the earliest cases concerning ultra vires is *Osborne, Tremper & Co. v. King Cy.*, 76 Wash. 277, 136 P. 138 (1913). In *Osborne*, the plaintiff sued King County for services performed under a contract with the river and harbor commission. A number of King County residents, operating upon the belief that the United States intended to construct the Lake Washington Ship Canal, petitioned the county commissioners for appointment of the river and harbor commission and it was thereafter appointed. The river and harbor commission then contracted with the plaintiff for preparation of an assessment roll. Payment for these services was to come from the property assessments. A few months later, the county commissioners rescinded the authority of the river and harbor commission. In the plaintiff's action to collect for services, the court denied recovery, noting the general rule that

> where there is a want of power to make a contract or a want of power on the part of the body of officers making the contract to bind the municipality, there can be no estoppel against the municipality to defeat payment by reason of accepting the benefit conferred by the contract.

Osborne, at 285-86. The court reasoned that the county commisioners did not have authority to create the assessment district, and therefore did not have authority to incur risks incident to the district's creation.

In Edwards v. Renton, 67 Wn.2d 598, 409 P.2d 153 (1965), the court confronted mixed substantive and procedural statutory violations, but approved recovery against the City of Renton. Renton had contracted with plaintiff for the installation of a traffic control signal, but failed to follow bidding procedures. The City neglected to properly budget funds for the installation. The court found that this contract represented a borrowing of funds which the City of Renton had no power to do. The court then went on to discuss the policy reasons for statutory municipal budget requirements and concluded that the contract ran afoul of these policies. Nonetheless, the court allowed a limited recovery where the contract was for a "public improvement furnished to and retained by the municipality [and where it was] within the scope of its authority to provide". Edwards, at 604. Edwards therefore moved the secondary ultra vires doctrine toward fulfilling the reasonable expectations of private parties contracting with public entities, consistent with the decline of the sovereign immunity doctrine. See RCW 4.92.090, 4.96.010.

The Edwards rule was further explained in Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968). Finch involved the power of King County to acquire and dispose of property in order to build roads. Although the facts are complicated, it appears that the county exchanged some worthless property for a road right of way. The City of Seattle then sought to annex the property, arguing that the County had no power to dispose of it because the property exchanged was dedicated "'to the use of the public forever'". Finch, at 163, 443 P.2d 833. The City urged a narrow interpretation of equitable estoppel against a municipality, arguing in essence that the doctrine could be valid "only when the governmental act is strictly within the recognized and established powers of government." Finch, at 169, 443 P.2d 833. The court rejected this view of equitable estoppel, holding instead that the distinction was between acts done "wholly without legal authorization" or in "direct violation of existing statutes" and "those acts which are within the scope of the broad governmental powers conferred, granted or delegated". (Italics mine.) Finch, at 172, 443 P.2d 833.

In Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982), the court most recently affirmed the Edwards analysis. In Noel, the court concluded that the Department of Natural Resources had authority to sell timber, but not without preparing an environmental impact statement. However, regulations in effect required no EIS be prepared. Finding the sale a procedural violation and because both the DNR and the purchaser had acted in good faith, the court held that recovery for the purchaser was necessary to prevent unjust enrichment. Noel, at 381, 655 P.2d 245.

I believe the instant case falls within the Edwards-Noel rule. The majority concluded in Chemical Bank I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." Chemical Bank I, 99 Wn.2d at 799, 666 P.2d 329. To that end, and to fulfill their statutory duty to develop sufficient energy sources, the participants entered into the agreements and subsequently pledged their revenues. Those acts were within their general powers as contemplated by Noel, Finch, Edwards and Osborne. Thus, as the action of the state or municipalities in entering into the agreements was only procedurally ultra vires, restitution may be obtained if a benefit was in fact given.

As to the remaining arguments of respondents, the common law doctrines which released their contractual obligations contemplate restitution if one party receives a benefit. For example, Restatement (Second) of Contracts § 272 (1981) states the remedy to be given if frustration occurs:

> (1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 377.
>
> (2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant the relief on such terms as justice requires including protection of the parties' reliance interests.

Similarly, as noted in Simonson v. Fendell, 101 Wn.2d 88, 93, 675 P.2d 1218 (1984), mutual mistake entitles the parties to rescission and return to their original position. As a

> general principle . . . rescission contemplates restoration of the parties to as near their former position as possible or practical. J.I. Case Credit Corp. v. Stark, 64 Wn.2d 470, 392 P.2d 215 (1964); Yount v. Indianola Beach Estates, Inc., 63 Wn.2d 519, 387 P.2d 975 (1964).

Here, however, it would be impossible to return the parties to their positions prior to the contract given the lack of statutory authority of those participants released by Chemical Bank I. Those participants represent approximately 70 percent of the total monetary obligation. Justice requires some sort of restitution to the bondholders. Because the public utilities and municipalities also have equitable obligations, the remaining discussion concerning remedy, benefit and equitable distribution of loss will apply equally to those released by our original decision, and those released on common law contractual grounds.

As noted above, the Restatement's definition of benefit is quite broad. Thus, the task here is to determine whether any asserted benefits fall within this definition. I conclude they do.

WPPSS asked for and received $2.25 billion in bond revenues on the request of the participants. The participants received exactly what they bargained for through their representatives on WPPSS. As noted in comment A to Restatement (Second) of Contracts § 370 (1981), receipt by a party of performance bargained for is regarded as a benefit. I believe the facts of this case amply demonstrate that proposition.

Further, this arrangement by which participants purchased shares of the plants' electrical output in return for their pledge of revenues satisfied the utilities' duty to develop sufficient energy resources for their ratepayers. The pertinent statutes contemplate that electrical needs of a city or public utility district will be filled. To do this, the participants must spend significant sums of money to develop alternative resources to meet future demands. The City of Seattle, as amicus, observes that it has spent $37 million for various small projects, and will spend $21 million annually for settlement of the High Ross Agreements. The total cost of projects now in progress is $164 million. Several of these projects have been terminated and, as a result, the City of Seattle has absorbed the entire loss. Brief of amicus curiae City of Seattle, at 19. Clearly, most of the participants involved in WNP 4 and WNP 5 could not absorb similar development costs. To the extent that the nuclear plant projects relieved the participants of their immediate costs, while allowing them to fulfill their statutory duty, they received benefits from the bondholders.

Finally, it was for the participants' benefit that the plants were being built in the first place. By entering into these agreements, pledging their revenues as security and inducing the bondholders to lend money to WPPSS, the participants anticipated that they would be able to guarantee their consumers electricity at the low rates projected for nuclear power. Without such an arrangement, each utility would have had to either develop other sources of electricity or purchase electricity at whatever would be the then current market price. The bond revenues allowed them to avoid consideration of both of these alternatives.

Moreover, I am not persuaded by respondents' theory that the benefits of the bond revenues flowed to WPPSS and no further. As discussed in detail above, WPPSS existed as a joint venture of the member utilities and the participants. Despite the majority's conclusion that the participants lacked the statutorily required ownership interest, I believe that the real interested parties to this transaction were the participants. To them, the benefits flowed and, from them, restitution is therefore proper. These factors lead me to the conclusion that justice requires some relief to the bondholders.

Remedy

The appellants have established two theories of recovery-promissory estoppel and unjust enrichment. Restatement (Second) of Contracts § 90 (1981) states that the remedy for a breach of promissory estoppel may be limited as justice requires. Similarly, the Restatement of Restitution § 1 (Tent. Draft No. 1 1983) provides:

> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Appellants contend that

principles of restitution entitle the bondholders to the entire $2.25 billion plus interest. I disagree. This figure would grant the bondholders their expectancy interest on the contracts. The majority has held that those contracts are void, however. Moreover, appellants' suggested remedy ignores the realities of the bond market. Much of the loss suffered by the bondholders is the result of panic-trading, speculation, and other forces that cannot be attributed solely to the participants' breach of pomise. For instance, even before the participants disputed their legal obligation, prices quoted in the Wall Street Journal indicated the bonds were trading at levels substantially below par.

Also, appellants' argument for full restitution confuses the amount loaned WPPSS with the amount of benefit received by the participants. Just as the bondholders' investment was diluted by market forces, the participants' benefit was diluted by raising interest rates and market forces which made completion of the plants impossible.

Finally, amongst the people who now hold these bonds are numerous individuals who purchased their bonds after this court clearly stated that no statutory authority existed to enter the contracts. Those individuals do not come to equity with "clean hands" and I believe no equitable considerations weigh in favor of granting these individuals a windfall.

Given the complexity of this case and the posture in which it is now before this court, I am unable to discern the proper amount of recovery to the bondholders. I believe that equitable principles, however, require that we recognize the complex forces that led to the bondholders' present loss. Those principles convince me that the proper measure of restitution in this case may not exceed the value of the bonds on the day prior to our decision in Chemical Bank I. After that date, investors were clearly on notice that no authority existed. Prior to that date, much of the bondholders' investment was dissipated by forces unrelated to the participants' promises. Moreover, I also believe that individuals purchasing their bonds after that date should be entitled to the purchase price of those bonds and no more. It would be inequitable to allow these individuals to profit from the losses of bona fide bondholders and the participants' ratepayers. Finally, I believe that the participants are entitled either to an offset of any value contained in the plants or to the plants themselves.

This award sets only the maximum amount of recovery I would allow under the legal theories herein discussed. The trial judge could reduce this amount by other equitable considerations and may make such provisions for payment of the judgment as are just and equitable, considering the relative positions of the bondholders and ratepayers.

For the foregoing reasons, I dissent.

DOLLIVER, J., and ALEXANDER, J. Pro Tem., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

ORDER DENYING MOTION FOR RECONSIDERATION

CHEMICAL BANK,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1, ET AL,

Respondents.

The Court having unanimously decided that the proposed intervenors' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 17th day of December, 1984.

/S/

Chief Justice

102 Wn.2d 874

APPENDIX C

FOURTEENTH AMENDMENT
TO THE UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

84-1414 (?) No. 84-1258

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IN THE
Supreme Court of the United States
OCTOBER TERM 1984

FREDRIC HABERMAN, *et al.*,

Petitioners,

— v. —

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

21 RESPONDENTS' BRIEF OPPOSING CERTIORARI

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REASONS FOR DENYING THE WRIT

The 21 Respondents[1] (among the 90 respondents in this case) submit this brief to support their respectful request to this Court to deny certiorari.

Petitioners assert that the Washington Supreme Court denied them due process by denying their motion to intervene as parties plaintiff in the case of *Chemical Bank v. WPPSS et al.* ("*Chemical Bank II*"), 102 Wn.2d 874, 691 P.2d 524 (1984), now before this Court on pending petition for certiorari as *Chemical Bank and WPPSS v. PUD #1 of Benton County et al.*, No. 84-1258.

I. FORMER BONDHOLDERS HAD NO INTEREST TO JUSTIFY INTERVENTION

In the action in which Petitioners sought to intervene, the plaintiff, Chemical Bank, was the designated trustee[2] for holders of bonds issued by Washington Public Power Supply System ("WPPSS") for its nuclear generating Projects No. 4 and 5. Plaintiff Bank sought as relief a declaratory judgment that the Participant/respondent public utilities had an enforceable contractual obligation to pay to WPPSS money with which WPPSS, in turn, could pay the principal and interest on the bonds that it had issued.

Petitioners identify themselves as "present and former bondholders" (Petit. 3) of WPPSS No. 4 and 5 bonds. Those Petitioners who are former bondholders lack an interest relating to the property or transaction that is the subject of the action. These former holders, who may have claims against those responsible for their losses when they sold their bonds, have no interest in compelling payment on bonds that they do not own.

---

[1] *Oregon:* City of Bandon. *Montana:* Glacier Electric Cooperative. *Nevada:* Wells Rural Electric Co. *Washington:* City of Port Angeles, Centralia Electric Light, McCleary Light and Power, Elmhurst Mutual Power & Light Co., Ohop Mutual Light Company, Okanogan County Electric Cooperative, Inc., Parkland Light & Water Co. *Idaho:* Cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert; Clearwater Power Co., Idaho County Light & Power Cooperative Assn., Inc., Northern Lights. Inc., Prairie Power Cooperative, Inc., Rural Electric Co. and Unity Light & Power Co.

[2] Under Section 11.4 of the Bond Resolution (WPPSS Board Resol. 890; CS 128, Attachment; CP 6605), Chemical Bank is authorized to represent the bondholders' interest in general and, in particular, to represent them by legal action in event of a default. WPPSS has indicated that the "event of default" occurred in 1983, when WPPSS admitted "its inability to pay its debts . . . as they became due." Chemical Bank's First Interrogatories to WPPSS, p. 2, 7/22/83.

II. PRESENT BONDHOLDERS — NO RIGHT TO INTERVENE UNDER COURT RULE

A. Civil Rule 24 - Intervention.

1. *Application Was Not Timely.*

When they sought to intervene, Petitioners proposed: (1) to return the case to the trial court without first deciding the pending appeal; (2) to more than double the number of parties (then and now 90); and (3) to raise new issues (e.g., negligence, professional malpractice, failure of plaintiff Bank to represent the bondholders' interest adequately Motion, pp. 17-21 and 33-34, prayers for money damages, reformation, and other injunctive relief).

The State of Washington provides no statutory right to intervene in a case of this kind. Washington provides for intervention under the terms of its Civil Rule 24, the language of which is identical to that of Federal Civil Rule 24, in all relevant particulars.

Petitioners declare that "[N]either Washington statutes nor case law imposed a timeliness requirement for a motion to intervene" (Petit. 19). True, but Petitioners did not seek to intervene under the authority of either a statute or a case. They sought to intervene under the authority of court rules, and the applicable rule provides for intervention "upon timely application" (CR 24).

Petitioners did not serve or file that motion to intervene until January, 1984. This was 1⅔ years after the action had been started (May, 1982). During the intervening 20 months the case had been intensively litigated, judgment had been entered twice, and the second appeal to the Washington Supreme Court then was pending.

Petitioners did not allege that they were unaware of this well-publicized case, nor did they allege circumstances that might have excused their delay in moving to intervene. Petitioners showed no facts that might have excused their having stood by until they observed a decision with which they disagreed before they sought to enter the case — and not only to enter it but, in effect, to start it all over again.

2. *The Bank Adequately Represented Petitioners' Interests.*

a. No Difference in Objective of Existing Party (Chemical Bank)

As bondholders, Petitioners had an interest, of course, in an action that sought a declaration that someone should pay them money, and the disposition of the action would affect their ability to protect that interest. However, such a showing of interest is not enough to give a right to intervene if the would-be intervenors (Petitioners) cannot show that the existing party did not adequately represent them.

As the contractually designated trustee, Chemical Bank performs the function of pursuing the bondholders' interest in this action. Petitioner bondholders had the same objective as the Bank: obtaining payment on the bonds. As bondholders among bondholders, Petitioners had an identity of interest with all WNP 4 and 5 bondholders, and the Bank represented all. To add Petitioners as parties would have duplicated rather than assisted.

The identity of interest and objective in this action between Petitioner bondholders and plaintiff Bank as the designated trustee for all bondholders provided for no right of intervention on this ground.

b. Bank's Performance Was Not Shown to Have Been Inadequate

Where inadequacy of representation cannot be shown to be caused by divergent objectives, it must be shown to depend on the existing parties' performance: collusion, bias, incompetence, indolence, inexperience, etc. This inadequate performance may result directly from the counsel for existing parties or indirectly from these parties directing their counsel.

Here, Petitioners did not show that plaintiff Bank had attempted to induce its counsel to act against the interests of the WNP No. 4 and 5 bondholders in general, or of Petitioner bondholders in particular.

Nor did Petitioners allege bias, incompetence or lack of diligence by plaintiff Bank's respected and experienced counsel.

B. Civil Rule 19 — Petitioners Did Not Show Themselves Entitled To Be Joined as Indispensable Parties

When they sought to intervene, although Petitioners declared themselves to be indispensable parties (Motion at 2, 22), they did not show facts that gave them a right to be joined on this ground. In actuality, CR 19 denies "indispensability" status to an interested person that already is adequately represented by others with the same interest.

Nor did Petitioners, either in their motion to intervene or in their Petition to this Court, allege an inability for any reason to seek relief in other litigation.

III. NO DUE PROCESS ISSUES RAISED

Because Petitioners failed to show a right to intervene, the Washington Supreme Court did not deny Petitioners due process of law by denying their motion to intervene.

Respectfully submitted April 5, 1985.

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(3)

No. 84-1414

In the

Supreme Court of the United States

OCTOBER TERM, 1984

FREDRIC HABERMAN, *et al.*,
Petitioners,
v.
CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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April 8, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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7pp

This Brief In Opposition is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.
Blachly-Lane County Cooperative Electric Association
Central Electric Cooperative, Inc.
Columbia Basin Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative, Inc.
Hood River Electric Cooperative
Lane Electric Cooperative, Inc.
Midstate Electric Cooperative, Inc.
Salem Electric
Umatilla Electric Cooperative Association
Wasco Electric Cooperative, Inc.
Kootenai Electric Cooperative, Inc.
Fall River Rural Electric Cooperative, Inc.
Lost River Electric Cooperative, Inc.
Raft River Rural Electric Cooperative, Inc.

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QUESTION PRESENTED

Did the Washington Supreme Court unconstitutionally deprive petitioners of due process of law by denying petitioners' motion to intervene when the case had already been fully litigated at the trial court level and was on its second appeal to the Washington Supreme Court, where the basis for the denial was that the motion to intervene was untimely under Washington law and that the petitioners were adequately represented by the plaintiff in the action (their bond trustee), and where petitioners' proposed claim-in-intervention were and are the subject of a separate action by petitioners in the state trial court?

PARTIES TO THE PROCEEDINGS

The seventeen respondents on whose behalf this Brief In Opposition is submitted are listed on the inside front cover. They are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Petitioners failed to include in their list of respondents two groups of parties which had intervened in the trial court proceedings below. One group consisted of ratepayer associations and individual ratepayers of certain Washington public utility districts, and the other group consisted of ratepayers of the City of Ellensburg, Washington.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Washington Supreme Court violated the federal constitution by denying petitioners' motion to intervene in that court when the case had already been fully litigated at the trial court level and the case was on its second appeal to the state supreme court, and where the petitioners were asserting the same claims in a separate action in the trial court. This absurd contention presents no substantial federal question worthy of review by this Court.

Petitioners cite no Washington statute or judicial decision establishing any recognized procedure for private parties to intervene in appellate proceedings. Washington does have a rule of procedure, analogous to Rule 24 of the Federal Rules of Civil Procedure, governing intervention in the trial court period. Washington Civil Rule 24 allows intervention of right "[u]pon timely application . . . , unless the applicant's interest is adequately represented by existing parties." Here, petitioners' motion to intervene in the state supreme court was obviously untimely, and petitioners' interests were more than adequately represented by their bond trustee.

In any event, no question arises under the federal constitution when a state court denies a motion to intervene in a state court appellate proceeding. Petitioners have cited no authority suggesting otherwise. The only authority petitioners cite in support of their contention that a denial of intervention "goes to the heart of due process" (Pet. at 27) is *Local 283, International Union of United Automobile Workers of America v. Scofield*, 382 U.S. 205 (1965). That case held nothing of the kind. In that case this Court looked to the "statutory design" of the National Labor Relations Act in concluding that parties who are successful in unfair labor practice proceedings before the NLRB should be allowed to intervene in the Court of Appeals in proceedings to review NLRB decisions. The Court expressly limited its analysis to such proceedings. 382 U.S. at 210. That case gives no support whatsoever to petitioners' contention that a private party may have a federal constitutional right to intervene in a state court appellate proceeding.

Indeed, even in reviewing a *federal* court's application of *federal* rules of procedure in a case involving important *federal* civil rights, this Court has stated:

> "Intervention in a federal court suit is governed by Fed Rule Civ Proc 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."

NAACP v. New York, 413 U.S. 345, 365-366 (1973). Surely the constitution produces no different result when the case involves a state court's application of state rules of procedure in a case involving only state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
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OCTOBER TERM, 1984

FREDRIC HABERMAN, *et al.*,
Petitioners,
v.
CHEMICAL BANK and WASHINGTON PUBLIC
POWER SUPPLY SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

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2

QUESTION PRESENTED

Whether the Due Process Clause requires a state supreme court to allow a motion for leave to intervene where:

(a) The moving parties had notice of the pendency of the proceeding;

(b) the motion for leave to intervene was filed 20 months after the case was commenced;

(c) the motion to intervene was filed after the case had been appealed to the state supreme court, remanded to the trial court, and was again on appeal to the state supreme court; and

(d) the motion to intervene sought remand of the case to the trial court to add defendants, reopen discovery and change the nature of the proceeding from a declaratory judgment action to a suit for monetary damages.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-1414

FREDRIC HABERMAN, *et al.*,
Petitioners,
v.
CHEMICAL BANK and WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

Respondent Public Utility District No. 1 of Snohomish County, Washington ("District"), respectfully prays that the Court deny the Petition for a Writ of Certiorari ("Petition") to the Washington Supreme Court submitted by Frederic Haberman, *et al.* ("Petitioners").

OPINIONS BELOW

The District accepts the statement of the proceedings below at page 2 of the Petition.

STATEMENT OF THE CASE

Introduction

This case arises out of the efforts of Petitioners to intervene in the declaratory judgment action commenced by Chemical Bank, as bondholder trustee, to determine the validity of the unconditional payment obligation contained in certain contracts between the Washington Public Power Supply System ("Supply System") and the 88 public utilities, which were participants in Supply System Projects 4 and 5 ("Projects").

The Petitioners sought to intervene in this matter at the last possible moment of a long and arduous trial and appellate process. Rather than intervening when the case was commenced, Petitioners waited. They waited for the trial court to decide the case on a motion for summary judgment. They waited for the Washington Supreme Court to consider the case on appeal, issue a decision, and hear and reject a motion for reconsideration. They waited for the trial court to again consider the case on remand, and to enter a final judgment. And they waited for a second appeal to be taken to the Washington Supreme Court.

At this point in the proceedings, Petitioners requested permission to intervene in order to assert damage claims not germane to the action, to add additional parties, and to seek a second remand to the trial court so that they could reopen discovery to develop a factual record to support their claims. After considering the totality of the circumstances, including Petitioners' ample opportunity to intervene earlier, their adequate representation by Chemical Bank, the fact that the claims Petitioners wished to assert were not appropriate to a declaratory judgment action, and the extreme prejudice which would be suffered by the parties, the Washington Supreme Court denied the motion to intervene.

Background

The declaratory judgment action in which Petitioners belatedly sought to intervene arose out of the default of the Supply System on municipal bonds which it issued to finance construction of two nuclear plants known as Projects 4 and 5 ("Projects"). The Projects were part of a major resource construction effort undertaken by the Supply System to meet projected power shortages.

During the 1960's, the Pacific Northwest experienced a period of sustained and substantial growth. Power demand forecasts prepared by the Bonneville Power Administration ("Bonneville") and others predicted that by the early 1980's, the region's hydroelectric resources would be unable to meet projected needs. Under Bonneville's leadership, a plan was formulated which called for the construction of a large number of thermal generating projects. The Supply System was identified as an organization which could finance and construct a number of nuclear power plants, since it had prior resource construction experience, and was a separate municipal corporation with the authority to issue bonds in its own name.

The first three plants built by the Supply System, Projects 1, 2 and 3, were financed by "Net Billing Agreements" between the Supply System, Bonneville and the region's public and private utilities. These agreements provided the participating utility with a credit against their Supply System payment obligation in an amount equal to their Bonneville power bill. This arrangement, called net billing, provided a Bonneville guarantee of bond payment.

While Projects 1, 2 and 3 were under construction, Bonneville advised its public utility customers that additional plants were needed. Since a Treasury ruling had rendered net billing unavailable, an alternate financing method was needed. When Bonneville issued its Notice of

Insufficiency in June, 1976, giving it the contractual right to ration energy deliveries, drafts of the Project 4 and 5 Participants' Agreement ("Agreement") were focused upon as the only readily available method for financing the additional plants purportedly needed to avoid rationing and shortages.

In this energy crisis climate, and at the urging of Bonneville, 88 of the region's public utilities executed the Agreement with the Supply System. The Agreement imposed an unconditional payment obligation in exchange for a conditional right to receive power. Upon execution of the Agreement, the Supply System issued bonds in its own name and commenced construction of the Projects.

During construction, the Projects were beset with innumerable difficulties, including regulatory changes, labor problems, double digit inflation and construction delays. Further, the predicted energy deficit failed to appear, as demand for electricity decreased sharply due to a severe national recession and substantial wholesale rate increases. With financing at reasonable rates impossible to obtain, on January 22, 1982, the Supply System decided to terminate the Projects.

Proceedings Below

In May, 1982, prior to the first participant payment required by the Agreement after termination, Chemical Bank, as bondholder trustee, filed a declaratory judgment action in the Superior Court of King County, Washington, seeking a declaration that the unconditional payment obligation contained in the Agreement was valid and binding on all participants. On July 20, 1982, Chemical Bank and the Supply System moved for summary judgment, and the trial court ruled in their favor. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, Slip Op. at 3-4 (Super. Ct. King County, Nov. 16, 1982).

An expedited appeal was taken to the Washington Supreme Court. The issue presented was whether state law permitted Washington municipal utilities to execute a contract containing an unconditional payment obligation for generating resources which they did not own, and from which they had only a conditional right to receive electricity. In a comprehensive decision, the Washington Supreme Court reviewed all of the pertinent statutes, and analyzed in detail the provisions of the Agreement. The court concluded that municipal utilities are creatures of statute, possessing only those powers expressly granted to them or necessarily implied. *Chemical Bank v. Washington Public Power Supply System,* 99 Wn.2d 772, 666 P.2d 329 (1983) ("Chem Bank I"). The court noted that it had previously approved public utility participation in contracts containing an unconditional promise to pay only when the public utility had an actual ownership interest in the project. *Chem Bank I,* 99 Wn.2d at 785. The court decided that under applicable Washington state law, absent ownership or control tantamount to ownership, municipal utilities lacked the statutory authority to contractually undertake an unconditional payment obligation. The court held the Agreement to be substantively *ultra vires,* and remanded the matter to the trial court. *Chem Bank I,* 99 Wn.2d at 799.

On remand, Chemical and the Supply System asserted numerous theories to sustain recovery, including restitution, equitable estoppel and some constitutional claims. Based upon abundant Washington precedent, the trial court concluded that as a matter of law equitable theories were not available to enforce a substantively *ultra vires* contract against Washington municipal utilities. *Chemical Bank v. Washington Public Power Supply System,* No. 82-2-06840-3 (Super Ct. King County, August 11, 1983) Order and Judgment.

As to the remaining participants which were not Washington municipalities, the trial court concluded that the basic purpose of the Agreement had been frustrated because its provisions could not function with 70% of the participants statutorily barred from the Agreement. The trial court decided that as a matter of law the remaining participants should be released. *Chemical Bank v. Washington Pacific Power Supply System*, No. 82-2-06840-3 (Super. Ct. King County, August 11, 1983) Order and Judgment.

Chemical Bank and the Supply System pursued a second appeal to the Washington Supreme Court, arguing restitution, equitable estoppel, and a constitutional theory drawing on the Due Process, Takings and Contract Clauses.

At this point in the proceedings, after 20 months of intense litigation, Petitioners filed their motion to intervene in the Washington Supreme Court. Petitioners sought intervention to assert alleged damage claims, to add defendants to the case, and to have the case returned to the trial court for a third time so the Petitioners could conduct discovery. The Washington Supreme Court opined that the efficient administration of justice and the principles of finality required timely submission of motions to intervene. *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 888, 691 P.2d 524 (1984) (Appendix at 29a) ("Chem Bank II"). The court concluded that the motion in this case was not timely, that the interests of Petitioners were adequately represented by Chemical Bank, and that the Petitioners were seeking to inject issues into the case which were being litigated in other forums. On these grounds, the court denied the request for intervention. *Id.*

RELATED LITIGATION

The Petitioners and other bondholders are pursuing a variety of remedies in state court actions. *See, Haberman, et al. v. Washington Public Power Supply System, et al.*, No. 84-2-06452-8 (1984) (Superior Court for King County, Washington) and *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (1984) (Superior Court for King County, Washington). These suits seek relief on state securities laws, misrepresentation, negligence and various equitable theories, and name as defendants many of the parties Petitioners intended to join in the case at bar.

In addition to these state court actions, Chemical Bank, former and current bondholders and various insurance carriers are actively pursuing multiple remedies in federal litigation. In the United States District Court for the Western District of Washington, numerous actions have been filed, including: *Chemical Bank v. Public Utility District No. 1 of Benton County, Washington, et al.*, C83-1080 (1983); *In re Washington Public Power Supply System Securities Litigation*, MDL-551 (1983); and *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, Washington, et al.*, C84-690 (1984). These actions have been consolidated, and they allege violations of federal and state securities laws, negligence, negligent misrepresentations, and common law fraud. In addition to the participants in the Projects, the Supply System, and its Board of Directors, these suits also name as defendants certain experts involved in various aspects of the projects.[1]

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[1] These experts include Blyth Eastman (the Supply System's financial adviser); Merrill, Lynch, Pierce, Fenner and Smith, Salomon Brothers, Smith Barney, and Prudential-Bache (lead underwriters for Project 4 and 5 bond issues); R. W. Beck (consulting engineer); Ebasco Services and United Engineers & Constructors (architects-engineers); Wood & Dawson and Houghton, Cluck, Coughlin & Riley (Supply System bond counsel and special counsel, respectively); and the Bonneville Power Administration.

These actions provide Petitioners and other bondholders with forums in which to litigate their allegations of negligence, reliance and other claims which they attempted to inject into the case at bar.

REASONS FOR DENYING THE WRIT

Review will not be granted to judgments of state supreme courts which rest on adequate state law grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1954). To be reviewed, a case must present a substantial federal question. *Dixon v. Duffy*, 342 U.S. 33 (1951). This court will not grant review merely to correct errors in decisions of state courts. *Gryger v. Burke*, 334 U.S. 728, *Reh'g denied*, 335 U.S. 837 (1948).

In this case, no substantial federal question is presented. Petitioners filed a motion to intervene at the end of a very long judicial proceeding. They sought to completely alter the nature of the case, by changing it from a declaratory judgment action to a suit for damages. Petitioners desired to add new parties to the proceedings, and in essence to start the entire case from the beginning by returning the matter to the trial court to reopen discovery.

In dealing with this request by Petitioners, the Washington Supreme Court recognized that the damage claims which Petitioners desired to litigate did not belong in this forum, since they were being litigated in other courts when the motion was filed. *Chem Bank II*, 102 Wn.2d at 889 (Appendix at 34a). Further, the court considered all the circumstances, including the fact that Petitioners' interests were being adequately represented by Chemical Bank and the substantial prejudice granting Petitioners' request would entail for other parties. *Chem Bank II*, 102 Wn.2d at 888-889 (Appendix 29a-33a). The Washington Supreme Court exercised its discretion and, based upon state law, denied the motion. *Id.* In so doing, the court did not abuse its discretion, nor did it deny the Petitioners due process. No substantial federal question is presented by this decision.

I. Denial of an Untimely Motion to Intervene Does Not Present a Substantial Federal Question

Under both Washington and Federal Rules of Civil Procedure, motions for leave to intervene must be presented in a timely fashion.[2] Timeliness is not precisely defined in the rules of civil procedure, but is a matter to be determined from all the circumstances of the case. *Iowa State University Research Foundation v. Honeywell*, 459 F.2d 447 (1972); *Rains v. Lewis*, 20 Wash. App. 117, 579 P.2d 980 (1978). However, motions to intervene after judgment has been rendered will only be granted in unusual circumstances. *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970); *Martin v. Pickering*, 85 Wn. 2d, 241, 533 P.2d 380 (1975). Motions for intervention filed after judgment are not favored, and will usually be denied. See, 3B *Moore's Federal Practice* ¶ 24.13[1] at 24-526. The basic rationale for this policy has been stated:

> The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening.

United States v. Blue Chip Stamp Co., 171 F. Supp. 432, 436 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 975 (1968).

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[2] The language contained in the Washington Rule of Civil Procedure governing intervention (CR 24) and the companion Federal Rule is virtually identical. The Washington Supreme Court routinely relies on federal decisions for guidance when interpreting CR 24. *See*, for example, *Martin v. Pickering*, 85 Wn.2d 241, 244, 533 P.2d 380 (1975), citing *United States v. Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Me. 1954), *aff'd sub nom. Baker v. United States*, 221 F.2d 957 (1st Cir. 1955), *cert. denied*, 350 U.S. 842 (1955).

In its decision denying intervention, the Washington Supreme Court relied upon these same criteria, and articulated the same policy concerns. The court noted that the motion to intervene ". . . was not filed until this action reached the late stages of the appellate process." *Chem. Bank II*, 102 Wn.2d at 888 (Appendix at 30a). The court recognized that ". . . the efficient management of litigation can be achieved only by timely application." *Chem Bank II*, 102 Wn.2d at 888 (Appendix at 29a). And the court acknowledged that to grant Petitioners' request would ". . . require duplication of work by attorneys and the judicial system at a staggering cost to all." *Id.* Given these circumstances, the Washington Supreme Court properly exercised its discretion to deny the Petitioners' motion.

Petitioners' attempt to bolster their constitutional claim by asserting that a restraining order entered by the trial court prevented their intervention, and that their right to intervene did not ripen until after default. Petition for Writ at 21-22. Under Petitioners' theory, this made their eleventh hour motion timely. This argument seriously mischaracterizes the effect of the restraining order, and attempts to relieve Petitioners of their duty to act in a timely fashion.

The restraining order cited by the Petitioners was issued by the trial court to restrain parties from attempting to trigger an event of default in order to gain access to additional remedies. The purpose of the restraining order was to allow the contractual obligations of the parties to be resolved through litigation without a default being declared. The restraining order did not in any fashion deprive Petitioners of their ability to timely seek party status in the instant case.[3] The assertion that there is some sort of causal connection between Petitioners' tardy motion and the existence of the restraining order is without merit.

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[3] The restraining order entered by the trial court on May 27, 1983, prohibited the declaration of a default, and the exercise of remedies available in the event of a default. It provided in part:

Even if it is assumed, *arguendo*, that the restraining order did in some fashion prevent Petitioners from intervening until it was vacated by the trial court, this does not explain their extreme tardiness in filing their motion. The restraining order was vacated on July 22, 1983. Had Petitioners intervened at that time, they could have participated in the hearing before the trial court on August 8, 1983, and could have sought party status before the second appeal to the Washington Supreme Court was perfected. Instead, Petitioners failed to take action for an additional six months.

Petitioners are also in error in asserting that Supply System Bond Resolution No. 890 deprived them of the ability to seek party status through intervention. The only portion of this Resolution which is even remotely applicable is Section 11.5, which prohibits bondholders from instituting actions to enforce provisions of Resolution No. 890.[4] Petitioners have cited no provision in the

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> 3. Chemical Bank, and all persons and entities presently or hereafter owning or holding any bonds, or any interests therein or thereunder, heretofore issued by the Washington Public Power Supply System under or pursuant to its Board of Directors Resolution No. 890, or resolutions supplemental thereto, in connection with its Projects Nos. 4 and 5, are hereby restrained and enjoined, pending entry of judgment in this case declaring the parties' respective rights and obligations, or until further order of the court, from declaring a default under said Resolution No. 890, or resolutions supplemental thereto, or from exercising any remedies upon any such default, including but not limited to (i) issuing a notice of default under or pursuant to Section 11.1(3) of said Resolution No. 890 or (ii) declaring the principal of outstanding bonds, or any interest accrued thereon, to be due and payable immediately . . . .

[4] Section 11.5 of Supply System Resolution No. 890 addresses the right of present bondholders to institute litigation to enforce the resolution, and makes no reference to their right to seek intervention in suits commenced by others. It states in part:

Resolution which impinges on the ability of the bondholders to intervene in a suit instituted by another party. Further, the instant case did not seek to enforce provisions of the Resolution, but only to declare contractual rights and duties under the Agreements. Finally, some of the Petitioners are former bondholders, to whom the provisions of the Resolution had no application, since it only affects those currently holding bonds. The Resolution did not inhibit Petitioners' ability to seek intervention and does not excuse their untimely motion.

It is well recognized by this Court that it is ". . . encumbent upon the appellants . . . to take immediate steps to protect their interests . . ." by timely filing a motion to intervene. *NAACP v. New York*, 413 U.S. 345, 367 (1973). If a party has knowledge of the pendency of a matter yet fails to act until the eleventh hour, they will not be heard to complain if their tardy motion to intervene is denied. *Id.* In such a case, a denial of the motion to intervene does not present a substantial federal question.

Suits by Individual Bondholders; Bondholders' Committee. Except as otherwise specifically provided in this Section, no holder of any of the Bonds or coupons shall have any right to institute any suit, action or proceeding at law or in equity for the enforcement of any provision of the Resolution or the execution of any trust under the Resolution or for remedy under the resolution, unless such holder shall have previously given to the Bond Fund Trustee written notice of the happening of an Event of Default, as provided in this Article, and the holders of at least twenty per cent (20%) in principal amount of the Bonds then outstanding shall have filed a written request with the Bond Fund Trustee and shall have offered it reasonable opportunity either to exercise the powers granted under the Resolution or to institute such action, suit or proceeding in its own name, and unless such Bondholder shall have offered to the Bond Fund Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and the Bond Fund Trustee for a period of sixty (60 days after the receipt by it of such notice, request and offer of indemnity shall have refused to comply with such request . . . .

Petitioners argued below, and assert again in their Petition that their intervention should have been permitted because their interests were not adequately represented. As the Washington Supreme Court held, this assertion is without merit. It is well established that the party moving to intervene has the burden of proof, particularly if they are asserting inadequate representation. *Ordnance Container Corp. v. Sperry Rand*, 478 F.2d 844 (5th Cir. 1973). In a case where the intervening and existing parties' interests are identical, inadequacy of representation is limited to questions of competence, collusion and bad faith. *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963).

Petitioners have failed to even allege grounds which would, if proven, satisfy these criteria. At most, they have made vague references to not being adequately represented. The Washington Supreme Court correctly found that throughout the case Chemical Bank had ". . . vigorously pressed the bondholders' claims." *Chem Bank II*, 102 Wn.2d at 888-889 (Appendix at 29a-33a).

Petitioners and Chemical Bank had the identical interests of obtaining judicial vindication of the unconditional payment obligation contained in the Agreement. The fact that Chemical Bank had not at that time filed suits seeking damages in other courts is irrelevant to the existence of their identical interests in the instant case. As the Washington Supreme Court found, Chemical Bank completely fulfilled ". . . the representative function . . ." for the bondholders. *Chem Bank II*, 102 Wn.2d at 889 (Appendix at 34a). Petitioners have provided no support for the proposition that Chemical Bank's representation was in any sense inadequate. This motion to intervene was properly denied.

II. This Court Will Not Disturb the Proper Exercise of Discretion in Denying a Motion to Intervene

It has long been recognized that the decision concerning a motion to leave to intervene is one which must consider all of the circumstances, and which the court below is peculiarly well suited to resolve. *Assoc. of Gen. Contr. of Cal. v. Sec. of Commerce,* 787 F.R.D. 31 (1977). It is an issue " . . . to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York,* 413 U.S. 345, 366 (1973). This is particularly so when the motion to intervene comes after entry of judgment.

NAACP v. New York is an instructive case in this regard, since it is factually similar to the instant case. In *NAACP v. New York,* intervenors sought to enter the lawsuit three months after it was filed, and just prior to the entry of summary judgment. Intervenors had notice of the proceeding, and had failed to take any action until the eleventh hour. The trial court denied the motion to intervene, and this Court affirmed that decision on appeal. The Court held that the claims of inadequate representation were unsubstantiated, and that the intervenors had failed to take timely action to protect their interests. The Court opined that ". . . the District Court did not abuse its discretion in denying appellants' motion." *NAACP v. New York,* 413 U.S. at 366.

In the instant case, Petitioners had notice of this matter and failed to make action for nearly twenty months. As in *NAACP v. New York,* Petitioners made allegations of inadequate representation, but failed to substantiate them in any manner. In the words of the Washington Supreme Court, Chemical Bank ". . . vigorously pressed bondholders' claims." *Chem Bank II,* 102 Wn.2d at 888-889 (Appendix at 29a-33a). Similarly, the appellants in *NAACP v. New York* and the Petitioners here, had alternative avenues and forums in which to assert their claims. Finally, granting the motion to intervene would have resulted in prejudice to the existing parties to the litigation, due to the late point in the proceedings at which intervention was requested. In denying Petitioners' motion for intervention, the court below did not abuse its discretion. No basis exists for granting review of this decision.

III. The Due Process Clause Does Not Prohibit State Courts From Interpreting State Law

State courts possess the supreme power to interpret and declare state law, and when such decisions rest on adequate state law grounds they are not subject to review even if they are erroneous. *Kryger v. Wilson*, 242 U.S. 171 (1916); *Central Land Co. v. Laidley*, 159 U.S. 103 (1895). The Due Process Clause is not violated merely by a change in the construction of a statute by a state court. *O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20 (1916). Rather, the due process protection is offended when a state deprives ". . . a person of all existing remedies for enforcement of a right . . . ." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). Petitioners have suffered no such deprivation.

In the instant case, the Washington Supreme Court had to harmonize the operation of the timely filing requirement contained in Civil Rule 24, and its prior interpretation of a statute which governs party status in declaratory judgment actions. The court decided that the policy considerations of efficient litigation management and finality of judicial decisions mandated that all interventions, regardless of the nature of the action, must be filed in a timely fashion. *Chem Bank II*, 102 Wn.2d at 888 (Appendix at 29a-30a). In so doing, the court overruled portions of *Williams v. Poulsbo Rural Tel. Ass'n*, 85 Wn.2d 241, 533 P.2d 180 (1975).

This ruling was consistent with due process requirements, since it did not deprive Petitioners ". . . of all existing remedies . . . ." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). As the Washington Supreme Court noted, and as the Petitioners concede, the claims which they sought to inject into this case were already the subject of litigation in federal court. *Chem Bank II*, 102 Wn.2d at 889 (Appendix at 34a). At most, Petitioners were not afforded an opportunity to duplicate the arguments and efforts previously made by Chemical Bank, acting as bondholder trustee.

Petitioners argue that the interpretation of state law by the Washington Supreme Court altered state law, thereby depriving them of due process. Petition for Writ, pp. 19-20. Once again, Petitioners are wide of the mark. The Due Process Clause does not prohibit state courts from interpreting state law, nor from altering prior interpretations when it is necessary to do so, even though litigants may claim reliance on the previous interpretation. Were it not so, state courts could be deprived of their power to declare the law by the simple expedience of a litigant claiming a reliance interest. Not only would this paralyze the state judiciary, but it would mean that every state court decision changing a prior state law interpretation would present a substantial federal question under the Due Process Clause.

The Due Process Clause has never been viewed as a vehicle for vesting this Court with appellate jurisdiction over all state law questions. As the Court has stated:

> . . . the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930).

Based upon this Court's decisions, Petitioners' efforts to conjure a substantial federal question out of a routine clarification of Washington state law must fail.

CONCLUSION

The Due Process Clause does entitle litigants to a meaningful opportunity to be heard in a proceeding appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). However, the opportunity to be heard must be exercised in a timely fashion. The Due Process Clause does not entitle potential intervenors to sit on their rights until the last possible moment, and then demand an opportunity to be heard at a time and in a manner which will prejudice the rights of existing litigants. *NAACP v. New York*, 413 U.S. 345 (1973).

In this case, Petitioners' motion to intervene was untimely, and was properly denied by the Washington Supreme Court. This decision was well within the discretion of the court, was based on Washington law, and should not be disturbed. Petitioners have failed to present any substantial federal question, and their Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 11th day of April, 1985.

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FILED
APR 12 1985
ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDERIC HABERMAN, *et al.*,
Petitioners,
v.
CHEMICAL BANK AND WASHINGTON PUBLIC
POWER SUPPLY SYSTEM, *et al.*,
Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Washington unconstitutionally deny Petitioners' due process rights when it denied their motion to intervene after entry of final judgment based upon its conclusions that (1) the motion was untimely and (2) Petitioners' interests were, and since the inception of the litigation below had been, adequately represented by Chemical Bank, Bond Fund Trustee for Washington Nuclear Plants 4 and 5?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages ii-vii of the Petition for Certiorari correctly identify the parties to this litigation. This Brief in Opposition to Petition for Certiorari is submitted by certain respondent Washington public utility districts and one Washington city, collectively referred to as the Washington Public Utilities Group. The Washington Public Utilities Group is comprised of the following: Public Utility District No. 1 of Benton County; Public Utility District No. 1 of Clark County; Public Utility District No. 1 of Cowlitz County; Public Utility District No. 1 of Grays Harbor County; Public Utility District No. 1 of Lewis County; Public Utility District No. 1 of Mason County; Public Utility District No. 3 of Mason County; Public Utility District No. 1 of Okanogan County; Public Utility District No. 2 of Pacific County; Public Utility District No. 1 of Skamania County; and, the City of Tacoma, Washington. The Washington Public Utilities Group represents shares of Washington Public Power Supply System Nuclear Projects 4 and 5 ("WNP 4 and 5") comprising approximately 45%.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1414

FREDERIC HABERMAN, *et al.*,

Petitioners,

V.

CHEMICAL BANK AND WASHINGTON PUBLIC
POWER SUPPLY SYSTEM, *et al.*,

Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners Haberman, et al. have expressly taken the position that this Court need not even consider their Petition for Certiorari unless this Court first grants the Petition for Certiorari in *Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.*, No. 84-1258 (hereinafter referred to as "Chemical Bank"). Haberman Petition at 5-6. Respondents, the Washington Public Utilities Group, respectfully pray that this Court deny the Haberman Petition for Certiorari regardless of the disposition of the Chemical Bank Petition.

OPINIONS BELOW

The Petition accurately refers to *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984). In addition, however, several opinions and orders relevant to the issues raised by Petitioners were rendered by the trial court in *Chemical Bank v. WPPSS, et al.*, No. 82-2-06840-3 (Superior Ct. of Washington for King County). Those opinions and orders are more fully discussed at pages 6-11, *infra*.

JURISDICTION

These Respondents respectfully disagree with Petitioners that this Court has jurisdiction to review the judgment of the Supreme Court of Washington, particularly insofar as it relates to Petitioners.

Review on writ of certiorari to this Court of a decision of a state court of highest jurisdiction interpreting exclusively state law may be granted only if there is a substantial federal question. United States Supreme Court Rule 17.1. Contrary to Petitioners' assertions, there is no substantial federal question arising from the Washington State Supreme Court's disposition of the intervention issues raised by Petitioners. In essence, the motion in the Washington Supreme Court and this Petition are nothing more than six bondholders' selective expressions of dissatisfaction with certain litigation decisions made by their appointed Bond Fund Trustee, Chemical Bank. Such concerns, whether or not they are well founded, fail to provide any basis for this Court's certiorari jurisdiction.

STATEMENT OF THE CASE

The Group respectfully refers to and incorporates herein by reference the Statement of the Case set forth at pp. 5-9 of the Group's Brief in Opposition To Petition For Certiorari filed in *Chemical Bank* (No. 84-1258).

REASONS FOR DENYING THE WRIT

Petitioners have failed to raise any substantial federal constitutional issues. The Washington State Supreme Court gave Petitioners a full and fair opportunity to brief and argue their intervention motion, and the motion was found to be deficient on both procedural and substantive grounds exclusively based upon state law. Like Petitioners in *Chemical Bank* (No. 84-1258), Petitioners here have advanced no legitimate justification for this Court to involve itself in this litigation.

1. Petitioners Have Failed to Meet This Court's Stringent Standards for Review of the Decisions of the Highest Court of a State.

Conspicuously absent from the Petition for Certiorari is any discussion whatsoever of this Court's time-honored and common sense reluctance to entangle itself in state court decisions concerning state law matters. This Court's standards for review of alleged constitutional violations differ dramatically when this Court is called upon to review the decision of the highest court of a state, as opposed to a lower federal court. Principles of federalism, comity, and abstention have come together to dictate that this Court show great deference and give overwhelming weight to the highest court of a state's resolution of both factual and state law issues. For example, it is a fundamental precept that, except in extremely limited circumstances which are discussed *infra*, this Court must accept as conclusive the construction given to a state statute or court rule by the highest court of a state. Thus, in *Ex parte Converse*, 137 U.S. 624, 631 (1890), this Court stated as follows:

> It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error . . . . But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Mr. Justice Cardozo further developed and defined that line of authority in *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362-65 (1932), when, on behalf of a unanimous Court, he held as follows:

> The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's.
>
> * * *
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

Even assuming, *arguendo*, that there was an error of state law by the Washington Supreme Court, this Court has strictly adhered to the view that an error of state law simply does not provide the basis for a legitimate claim of denial of due process.

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process;

> otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 731, *reh'g denied*, 335 U.S. 837 (1948). Moreover, the Constitution simply does not guarantee that the decision of a state court shall be free from error. *Patterson v. Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 461 (1906). *See Stein v. New York*, 346 U.S. 156, 181 (1952); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Roberts v. New York*, 295 U.S. 264, 277-78 (1934); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1923).

The only extremely limited circumstance in which this Court has reviewed a state court decision on due process grounds is where the state court determination is totally arbitrary and unprincipled. *See, e.g., Hughes v. Washington*, 389 U.S. 290, 295-98 (1967); *Roberts v. New York*, *supra*, 295 U.S. at 277-78. As demonstrated below, this very narrow exception to the rule that this Court will not sit in judgment of state court determinations of exclusively state law issues is inapplicable to this litigation.

Petitioners have failed to come forward with a "substantial federal question" under this Court's standards for review of the decisions of the highest court of a state. Thus, this Court is without jurisdiction to proceed further in this litigation.

2. Petitioners Have Failed to Show That Their Due Process Rights Were Violated

The core of Petitioners' due process argument is that they allegedly were denied any meaningful opportunity "to be heard in a court of law with respect to the adjudication of claims affecting [their] property interests." The record affirmatively demonstrates, however, that at all relevant times the Petitioners' interests were fully and vigorously represented.

The Washington Supreme Court squarely addressed and explicitly resolved this threshold issue when it held as follows:

> We turn now to the subsidiary question of whether the bondholders are bound by the results of this litigation. The trial judge's order released all claims, including the bondholders', raised against the participants. The declaratory judgment statute, however, states that an interested party who is not joined cannot be prejudiced by the results of the declaration. Since the bondholders are certainly parties who have an interest in the litigation, we must decide whether this section of the statute will be interpreted literally. If so, that portion of the order pertaining to the bondholders must be struck.
>
> We believe that this result would be improper, where, as here, the interested parties have a *designated representative*. The bond resolution stated that the bond trustee, *i.e.*, Chemical Bank, was to represent all bondholders. [Footnote deleted.] Chemical Bank has served in this capacity for the entire history of this action, and vigorously pressed the bondholders' claims. Under these circumstances, the bondholders must abide by the results obtained by their designated representative.

Chemical Bank v. WPPSS, *supra*, 102 Wn.2d at 888-89, 691 P.2d at 533. In making this determination that the bondholders—including Petitioners—had indeed been accorded their "day in court," the Washington Supreme Court had before it a richly developed and thoroughly detailed record on this very issue. The history surrounding the relationship between Chemical Bank and the bondholders is particularly relevant insofar as it relates to, and demonstrates the propriety of, the Washington Supreme Court's denial of the Petitioners' intervention motion.

The trial court below initially began a detailed analysis of the relationship between Chemical Bank and the bondholders in mid-1982 as the result of a motion brought by certain defendants for compulsory joinder of the bondholders pursuant to CR 19(a), or in the alternative for dismissal of the action for failure to join indispensable parties (the bondholders) pursuant to CR 19(b). After extensive briefing and oral argument, the trial court orally denied this motion on August 26, 1982. On September 15, 1982, the court filed a written order with regard to the August 26, 1982 oral decision. In part, that September 15, 1982 Order provides as follows:

> 1. The defendants' motion for compulsory joinder of bondholders or in the alternative for dismissal of this action pursuant to CR 19 is denied, inasmuch as *the interests of all holders of bonds* issued by the Washington Public Power Supply System pursuant to its Board of Directors Resolution No. 890 or resolutions supplemental thereto *are represented in this action by and will be protected by Chemical Bank, and all such bondholders will be bound by any judgment which may be entered in this action* . . . . (Emphasis added.)

Despite this definitive ruling that Chemical Bank completely and adequately represented the interests of the bondholders in this litigation, on its own initiative the trial court again inquired into the nature of the relationship between Chemical Bank and the bondholders in May, 1983. The second in-depth consideration of this issue arose in connection with a motion by the Supply System for a mandatory preliminary injunction which would have required, *inter alia*, disbursement to the Supply System of certain funds held in a Court-approved escrow.[1]

On May 3, 1983, the trial court held a hearing to consider the procedure to be followed with regard to the Supply System's motion. During that hearing, the court called for additional briefing with regard to the issue of its jurisdiction to restrain both Chemical Bank and the bondholders from declaring a default. The Court stated as follows:

> The Court will . . . receive briefs and consider arguments as to jurisdiction, and . . . the Court also will hear arguments with respect to the questions posed today in terms of its ability to consider alternative forms of relief such as a restraining order restraining the bond fund trustee from declaring a default for failure to make the interest payments, given the fact that there is at this time sufficient money in the escrow account that can function as security for the interest payments, at least for the month of May and perhaps for the month of June.
>
> . . . It is clear that *the bond fund trustee and the bondholders through the trustee have come before the Court* seeking invocation of the Court's jurisdiction to enter a determination that they are entitled to payment of the interest and principal on the bonds pursuant to the terms of the Participants' Agreement.
>
> It is also clear that they are asking the Court, and if the Court ultimately rules in their favor, will be asking the Court to take whatever steps are necessary to enforce that. It would seem, likewise, apparent that

---

[1] This escrow is more fully discussed at p. 8 of the Group's Brief in *Chemical Bank* (No. 84-1258).

> they would then be bound by any orders or determinations that the Court would make during the pendency of the litigation, if such orders were made for the purposes of attempting to preserve the status quo so that a trial on the merits could occur, so that justice could be rendered to whichever party prevails.
>
> Likewise, *their position has been all along that whatever ruling the Court would make with respect to the final merits would be binding certainly on the bond fund trustee and the bondholders, because, pursuant to the terms of the agreement, they have conferred on the bond fund trustee the authority to bring this type of action.* So, those are issues that I want you to explore. (Emphasis added.)

In response to this call for additional briefing, numerous memoranda were filed, and on May 24, 1983, the court heard additional oral argument with regard to Chemical Bank's power and authority to represent the interests of the bondholders. On May 24, 1983, the Court orally ruled as follows:

> The question of jurisdiction has been raised as to whether the Court can enter an order that would be effective in this regard as against Bondholders. I think that question must be answered in the affirmative. The Court relied heavily on *Kerrison against Stewart* reported in 23 Lawyers Edition 843, 93 U.S. 15, when it ruled on the question that was before the Court many months ago as to whether Bondholders were necessary parties and whether this action should be certified as a class action.
>
> It is [worth it] again to quote the language in that case. The quote is on page 845. "It cannot be doubted, that under some circumstances, a trustee may represent his beneficiaries in all things relating to their

> common interests in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part."
>
> The critical language is this, and I will repeat. "He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him."
>
> When the Court ruled previously, the Court went into some detail in reaching the conclusion that the Bond Fund Trustee in this situation occupied such a position. Nothing has caused the Court to change its mind in that regard. I won't quote this language. I'll just refer it to you and incorporate it by reference into the Court's ruling in this regard, but if one carefully reads the position taken by Chemical Bank at that time, the arguments that they have advanced I believe are entirely consistent with what the Court has said in this ruling.

On May 27, 1983, the trial court entered an Order Restraining Declaration of Default. In pertinent part that Order provides as follows:

> 3. *Chemical Bank, and all persons and entities presently or hereafter owning or holding any bonds, or any interests therein or thereunder,* heretofore issued

> by the Washington Public Power Supply System under or pursuant to its Board of Directors Resolution No. 890, or resolutions supplemental thereto, in connection with its Projects Nos. 4 and 5, are hereby restrained and enjoined, pending entry of judgment in this case declaring the parties' respective rights and obligations, or until further order of the Court, from declaring a default under said Resolution No. 890, or resolutions supplemental thereto, or from exercising any remedies upon any such default, including but not limited to (i) issuing a notice of default under or pursuant to Section 11.1(3) of said Resolution No. 890 or (ii) declaring the principal of outstanding bonds, or any interest accrued thereon, to be due and payable immediately[.] (Emphasis added.)

Chemical Bank never sought appellate review of any of these rulings. More significantly, Petitioners have never discussed, much less objected to or sought review of, these rulings before either the Washington Supreme Court or this Court.

In fact, Petitioners have failed both below and in this Court to come to grips with the fundamental issue raised by their proposed intervention: under all the circumstances of this particular litigation, was intervention by these six individual bondholders necessary in order for them to attempt to assert the interests which they seek to protect? If intervention was not necessary for that purpose—and it was not—then no rights of Petitioners have been affected, much less violated in any way.

No matter what legal guidelines this Court chooses to follow in reviewing the intervention rulings below, it is clear that those rulings were well-reasoned, principled and amply supported by the record. For example, Washington State's

Superior Court Civil Rule 24(a) provides, in pertinent part, as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.* (Emphasis added.)

Accordingly, under the circumstances of this litigation, this Court's primary inquiry is whether, as a matter of purely state law, the Washington Supreme Court and the trial court committed virtually unprincipled error when they determined that Chemical Bank had adequately represented the interests of the potential intervenors *with regard to the issues before those Courts.* Apart from expressing some disagreement with some of the Bank's litigation decisions, however, Petitioners have come forward with no arguments which would call into question the vigor and adequacy of the manner in which the Bank discharged its duties as Petitioners' *designated representative.* The law is clear, of course, that a mere difference of opinion concerning litigation strategy or tactics does not render inadequate the representation of those whose interests are identical with an existing party which formally represents those interests in the litigation. *See, e.g., Pierson v. United States,* 71 F.R.D. 75, 80 (D. Del. 1976).

The simple fact is that Petitioners have raised no legitimate issues, much less any issues of a federal constitutional nature, concerning the adequacy of the Bank's representation of Petitioners' interests relative to the issues involved in the litigation below. Moreover, that conclusion is inevitable whether Petitioners' claimed deprivation of federal constitutional rights is analyzed by the standards set forth in either Washington State's Superior Court Rule 24, *supra*, or RCW 7.24.110, the state statute upon which Petitioners place so much reliance.

In pertinent part, RCW 7.24.110 provides as follows:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the persons not parties to the proceeding.

In its most recent opinion in this litigation, the Washington Supreme Court analyzed the provisions of both RCW 7.24.110 and Civil Rule 24 and resolved the apparent conflict between the statute and the court rule by providing that timely application for intervention is necessary even when the basis of the intervention is RCW 7.24.110. Petitioners, relying exclusively upon *Williams v. Poulsbo Rural Tel. Ass'n*, 87 Wn.2d 636, 555 P.2d 1173 (1976), contend that the Washington Supreme Court's interpretation of RCW 7.24.110 as requiring timely action constitutes a violation of Petitioners' due process rights. Once again, however, Petitioners have failed to realize that the key issue with which they must deal is whether or not they can demonstrate that there was any *need* for them to intervene. In addition, Petitioners have failed to bring to the attention of this Court that although it is normally the case that a declaratory judgment cannot be entered in Washington State unless the Court has before it all parties whose rights would be affected and whose interests would be prejudiced, the courts of Washington State have long recognized an exception to this principle when the rights of the "absent" parties are "virtually represented" by parties to an action. For example, in *Fahrenwald v. Spokane Savings Bank*, 179 Wash. 61, 63, 35 P.2d 1117 (1934), the Court defined the doctrine of virtual representation as follows:

> This doctrine involves an exception to the rule that all those interested and affected must be made parties, and is applied when the representation is fair and the parties represented have a common interest with those before the Court. [The doctrine of virtual representation] is particularly applicable if there is an identity of subject matter.

The Court in *Fahrenwald, supra,* also quoted with approval the following language from *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 672 (1914):

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire party, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all would be properly protected and maintained.

Fahrenwald, supra, 179 Wash. at 66, 35 P.2d at 1119. *See State ex rel. Cannery Workers & Farm Laborers Union v. Superior Court*, 30 Wn.2d 697, 700, 193 P.2d 362 (1948) (applying the equitable doctrine of virtual representation and finding that certain members of a union could represent and bind all other union members).

Significantly, the doctrine of virtual representation was most recently cited by the Washington Supreme Court in *Williams v. Poulsbo Rural Tel. Ass'n, supra.* In that case, the Washington Supreme Court painstakingly analyzed the potential interests of a number of different types of individuals and entities which, under a number of different theories, might have been necessary parties to that litigation. With regard to certain beneficiaries of a retirement plan involved in that litigation, the court considered a number of exceptions "to the general rule that all beneficiaries must be joined in an action by a beneficiary against a trustee." *Williams, supra,* 87 Wn.2d at 648, 555 P.2d at 1181. Among the well-recognized exceptions which the Court considered was the doctrine of virtual representation. With regard to that exception, the Court in *Williams,* held as follows:

> [T]he doctrine of virtual representation is not applicable to allow plaintiffs to sue individually because the absent beneficiaries do not necessarily have a common interest with the plaintiff.

Id. In the litigation now before this Court, however, the trial court and the Washington Supreme Court have already decided that, as a matter of state law, bondholders, including the six Petitioners, and Chemical Bank did have a completely common interest in the subject matter of the issues raised during the state court litigation. Accordingly, under those circumstances, Petitioners had absolutely no need personally to become parties to the state court litigation, and they had absolutely no right to do so pursuant to RCW 7.24.110.

Petitioners' argument concerning RCW 7.24.110, as well as all other arguments advanced by petitioners in this

Court, provide no basis for this Court to exercise its certiorari jurisdiction. In fact, Petitioners themselves have curiously, but explicitly, acknowledged that there is no good reason for this Court to consider Petitioners' conditional Petition. At p. 5 of their Petition, Haberman, et al., state as follows:

> Because petitioners Haberman, et al., have other avenues of relief available to them—the Haberman lawsuit in state court—petitioners initially did not intend to seek review of the Washington State Supreme Court's denial of intervention.[2]
>
> [2] Petitioners are also members of the plaintiff class in *In re Washington Public Power Supply System Securities Litigation, MDL 551.*

This Petition, whether it is conditional or not, is both ill-founded and unnecessary. The Petition should be denied and petitioners should attempt to avail themselves of what they themselves characterize as the other adequate avenues of relief available to them.

CONCLUSION

Petitioners have failed to frame any substantial federal constitutional issues which could give rise to this Court's certiorari jurisdiction. For all the reasons set forth above, the Petition For Certiorari should be denied.

RESPECTFULLY SUBMITTED this 10th day of April, 1985.

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No. 84-1414

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IN THE

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OCTOBER TERM, 1984

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PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NINE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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FRAYN PRINTING, SEATTLE, WASHINGTON

14pp

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QUESTION PRESENTED

Were six bondholders' due process rights implicated when the Washington Supreme Court denied their motion to file a complaint in intervention during the final stages of the appeal of a declaratory judgment action in which their interests had been fully represented by the bond fund trustee, their designated representative?

PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to the Petition for Certiorari is submitted by nine utilities that are respondents herein and were respondents below. The "Nine Respondents" are as follows:

Big Bend Electric Cooperative, Inc., Washington;
Lincoln Electric Cooperative, Inc., Washington;
City of Milton-Freewater, Oregon;
Missoula Electric Cooperative, Inc., Montana;
Ravalli County Electric Cooperative, Inc., Montana;
Salmon River Electric Cooperative, Inc., Idaho;
Tanner Electric Cooperative, Washington;
Vera Irrigation District No. 15, Washington; and
Vigilante Electric Cooperative, Inc., Montana.

The Petition for Certiorari incorrectly identifies two of the Nine Respondents. Vera Irrigation District No. 15 is incorrectly identified as Vera Irrigation District No. 10, and Ravalli County Electric Cooperative, Inc. is incorrectly identified as 'Pavelli' County Electric Cooperative, Inc.

None of the Nine Respondents has any subsidiaries or other affiliates. The Nine Respondents are unaware of any affiliates or subsidiaries of other respondents.

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STATEMENT OF THE CASE

Petitioners (also called the "Haberman petitioners") are six purchasers of revenue bonds issued by the Washington Public Power Supply System (the "Supply System") to finance the construction of Nuclear Projects 4 and 5 (also called the "Projects"). Following the termination of the Projects in January 1982, Chemical Bank, the bond fund trustee for holders of Project 4 and 5 bonds, including the Haberman petitioners, sought a judgment declaring that the utilities participating in the Projects were obligated under the Participants' Agreement to make payments to the Supply System sufficient to pay principal and interest on the bonds. After the Washington Supreme Court determined on interlocutory review that certain cities and public utility districts lacked authority to enter the Participants' Agreement, *Chemical Bank v. Washington Public Power Supply System,* 99 Wash. 2d 772, 666 P.2d 329 (1983) (*"Chemical Bank I"*), the trial court entered a final judgment declaring that the Agreement was invalid and unenforceable. The trial court also ruled that payment obligations could not otherwise be imposed upon participants on the basis of legal and equitable theories related to contract.

The appeal of the trial court's judgment was heard by the Washington Supreme Court in March of 1984. On November 6, 1984, the court issued its opinion affirming that judgment. *Chemical Bank v. Washington Public Power Supply System,* 102 Wash. 2d 874, 691 P.2d 524 (1984) (*"Chemical Bank II"*) (Appendix A to Petition for Certiorari). Chemical Bank and the Supply System have filed a Petition for a Writ of Certiorari seeking review of that decision. *Chemical Bank v. Public Utility District No. 1 of Benton County,* No. 84-1258 (petition for cert. filed Feb. 4, 1985)(hereinafter the "Chemical Bank Petition for Certiorari").

Two months before oral argument of the appeal before the Washington Supreme Court, the Haberman petitioners requested permission from the supreme court to file a complaint in intervention. After hearing oral argument by the petitioners' counsel, the Washington court denied their request as untimely in its *Chemical Bank II* opinion.

Because Chemical Bank and the Supply System have sought a Writ of Certiorari, the Haberman petitioners filed this Petition for Certiorari challenging the Washington Supreme Court's denial of their motion to intervene. The Haberman petitioners apparently request that their petition be considered only if the Chemical Bank Petition for Certiorari is granted. Petition for Certiorari at 5-6.

The history of the Chemical Bank litigation underlying this petition for certiorari is more fully set forth in the Nine Respondents' brief opposing the Chemical Bank Petition for Certiorari. The Nine Respondents incorporate that brief in opposition to the Haberman Petition for Certiorari. Several additional facts should be considered in connection with this petition for certiorari.

First, the complaint in intervention that the Haberman petitioners proposed to the Washington Supreme Court presented an array of additional factual allegations and added new claims and new defendants. Specifically, it added a claim based upon state securities laws against the original defendants. It also asserted various tort and securities claims against the engineering firms responsible for the construction of the Projects, the bond counsel who gave legal opinions in connection with the issuance of bonds, and the Supply System's financial consultants. Thus, the Haberman motion for intervention was not limited to the declaratory judgment action on appeal before the Washington Supreme Court. Instead, it sought to expand the scope of the original proceeding into a damage action based on new claims against the original defendants and other parties involved in constructing and financing the Projects.

Second, the Haberman petitioners have been vigorously pursuing all of their claims in separate litigation before the Washington courts. On May 7, 1984, the petitioners filed a complaint identical to their proposed complaint in intervention in superior court in Seattle, Washington. *Haberman v. Washington Public Power Supply System*, No. 84-2-06452-8 (Super. Ct. King County filed May 7, 1984) (the "Haberman action"). That complaint has since been amended several times to include new factual allegations and new defendants. Groups of large institutional bondholders have also joined the Haberman action. The

Haberman petitioners are currently amending their complaint to allege a claim under § 12(2) of the Securities Act of 1933. In short, every claim that the petitioners sought to assert by intervening in the Chemical Bank litigation is now being pursued in the Haberman action. Through that action, the Haberman petitioners have seized their opportunity for a full and fair hearing of their claims.

REASONS FOR DENYING THE WRIT

1. *The Petition for Certiorari Does Not Raise a Constitutional Question.*

The Haberman Petition for Certiorari raises no constitutional question. The essence of the petition is that the Washington Supreme Court's denial of the Haberman intervention motion was contrary to Washington law. Petition for Certiorari at 19. Even if that were true, this Court does not sit to correct a state court's errors in deciding state law. *Ex parte Converse*, 137 U.S. 624, 631 (1891). A due process question does not arise when a state's highest court allegedly makes an error in ruling on state law. *Gryger v. Burke*, 334 U.S. 728, 731 (1948). In this case, the Washington court neither committed an error nor denied the petitioners any right of due process by deciding that their last-minute motion to intervene was not timely.

The procedural rules of the Washington courts have always provided that any motion to intervene must be made in a timely fashion:

> Upon *timely application* anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Wash. Civ. R. 24(a) (emphasis added). In this case the Washington court simply held that the timely application requirement imposed by the procedural rules governing the conduct of all civil cases applies in a declaratory judgment action.[1] *Chemical Bank II*, 102 Wash. 2d at 887-88, 691 P.2d at 532-33 (Appendix to Petition for Certiorari at 28a-29a). The Washington Supreme Court's decision did not change any existing procedural rule.[2]

Nor has the denial of the motion to intervene deprived the Haberman petitioners of any due process right. The Due Process Clause of the fourteenth amendment affords litigants an opportunity for a hearing appropriate to the nature of the case. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). By denying the motion to intervene, the Washington Supreme Court did not deprive the Haberman petitioners of the opportunity to be heard on any of their claims. Indeed, before the court issued its decision, the petitioners filed their complaint in King County Superior Court. That action has been pending for almost a year and the petitioners continue to add new factual allegations and new legal claims.

The Washington court's decision raises no constitutional question under *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). There, the Alabama Supreme Court ruled in a novel and strained interpretation of its existing case law that the plaintiffs had chosen the wrong procedural avenue to seek review of a civil contempt judgment. The Alabama Supreme Court's procedural decision, if allowed to stand, would have foreclosed any scrutiny of the important constitutional rights impinged by the contempt judgment. Here, however, the Washington Supreme Court's denial of the motion to intervene at the final appellate phase of the bond fund trustee's declaratory judgment action simply redirected the Haberman action to a more appropriate forum. Because no opportunity for a hearing was denied by the decision, no due process question arises.

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[1] Petitioners imply that they could not have intervened in a timely fashion because the trial court had enjoined the bondholders from declaring a default on the bonds pending entry of a final judgment. Petition for Certiorari at 21-22. That order did not prevent the Haberman petitioners from intervening in a declaratory judgment action to determine the enforceability of the Participants' Agreement between the Supply System and the participants. It provides no excuse for their failure to do so at a reasonable stage in the Chemical Bank litigation.

[2] The petitioners argue that the Washington Supreme Court was required to allow intervention by its previous holding in *Williams v. Poulsbo Rural Telephone Association*, 87 Wash. 2d 636, 555 P.2d 1173 (1976). In that case, the court characterized the declaratory judgment statute as jurisdictional and held that the failure of the beneficiary of a trust to join all beneficiaries in a declaratory action against the trustee was a jurisdictional defect. Timely intervention was not at issue in *Poulsbo*, and the case therefore did not create any exception to the timeliness requirement of Wash. Civ. R. 24(a) for declaratory judgment actions. Moreover, in *Poulsbo* the court was required to apply "the general rule that all beneficiaries must be joined in an action by a beneficiary against a trustee." 87 Wash. 2d at 648, 555 P.2d at 1180. That rule does not reach this case, where the trustee is suing third parties on behalf of the beneficiaries.

The Haberman petitioners attempt to gerrymander the denial of their motion to intervene into a constitutional question by asserting error in the Washington court's holding that the bondholders were adequately represented in the Chemical Bank litigation by the bond fund trustee. However, both this Court's decisions and Washington law establish that Chemical Bank could legally represent the interests of the bondholders in the Chemical Bank litigation. *See, e.g., Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491 (1940); *Richter v. Jerome*, 123 U.S. 233, 248 (1887); *State ex rel. Cannery Workers & Farm Laborers Union v. Superior Court*, 30 Wash. 2d 697, 193 P.2d 362 (1948); *Fahrenwald v. Spokane Savings Bank*, 179 Wash. 61, 35 P.2d 1117 (1934).[3]

The petitioners also attempt to conjure up a due process question by raising irrelevant objections to the adequacy of Chemical Bank's representation of the bondholders. For example, petitioners now assert that Chemical Bank could not have adequately represented the bondholders in the Chemical Bank litigation because (1) it lacked standing to assert securities claims on behalf of the bondholders, (2) it did not sue certain other parties for damages, and (3) it could not represent former bondholders who had sold their bonds. This argument is specious. The petitioners' objections have no bearing on Chemical Bank's ability to represent bondholders in a declaratory action related to the obligations imposed by the Participants' Agreement.

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[3] Moreover, Chemical Bank was designated as the bondholders' representative to bring suit on their behalf to enforce or protect their rights and to determine the participants' obligations under the Participants' Agreement. *Chemical Bank II*, 102 Wash. 2d at 888-89 n.5, 691 P.2d at 533 n.5 (Appendix to Petition for Certiorari at 31a-33a n.5); Supply System Bond Resolution No. 890, § 11.4 at 89. No violation of due process occurs when a state court rules that the petitioners' designated representative may legally represent them in a declaratory judgment action.

Finally, the Haberman petitioners charge that Chemical Bank's representation of the bondholders is marred by a conflict of interest. Petition for Certiorari at 25. They assert that Chemical Bank represents the Supply System in supervising disposition of the assets of the Projects. In fact, no conflict of interest exists. Chemical Bank, as the bond fund trustee, does not represent the Supply System in assuming control over the Projects' assets—it represents only the bondholders in liquidating the assets for their benefit.

2. *The Due Process Arguments Raised By the Petitioners Are Not Adequately Presented to the Court By This Case.*

The due process arguments that the Haberman petitioners have advanced are not adequately presented by this petition. In denying intervention, the Washington Supreme Court did not deprive the petitioners of the opportunity for a hearing; it merely prevented the petitioners from disrupting complex litigation by adding new factual allegations, claims, and parties during the final appellate stage. All of the Haberman petitioners' claims are now pending before a Washington court.

Until the Washington courts have considered and decided petitioners' claims, including the effect of the *Chemical Bank II* judgment on those claims, petitioners' constitutional objections based on due process are premature. Petitioners' reliance on factual assertions undeveloped in this record make their constitutional arguments even more speculative. The Haberman petitioners have the opportunity to develop their factual allegations in the action now pending in the Washington superior court. However, until those facts are determined and the state law issues are decided, petitioners have neither a basis nor an adequate record upon which to present a constitutional question.

CONCLUSION

The Haberman petitioners seek to create a constitutional question from the Washington Supreme Court's denial of their last-minute motion to intervene. The Washington court's decision did not change a procedural rule and did not deny the petitioners of the opportunity to present their claims. Indeed, they are pursuing those claims in the Washington courts.

This Petition for Certiorari requests the Court to speculate about factual issues and legal claims without a record adequate for constitutional review. Until the petitioners' arguments are adequately before the Court, it should not review a state court's procedural decision—the denial of an untimely intervention motion—that presents no constitutional question.

For these reasons, the Nine Respondents respectfully request that the Haberman Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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